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(2) Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VIVENDI, S.A.,

Petitioner,

v.

OLIVIER GERARD, GERARD MOREL, WILLIAM CAVANAGH, RETIREMENT SYSTEM FOR GENERAL EMPLOYEES OF THE CITY OF MIAMI BEACH, and BRUCE DONIGER, INDIVIDUALLY AND, AS CLASS REPRESENTATIVES, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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August 6, 2007

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APPENDIX A

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 8, 2007

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the day of two thousand seven,

Present:
Hon. Wilfred Feinberg,
Hon. Guido Calabresi,
Hon. Richard C. Wesley,
Circuit Judges.

In re Vivendi Universal, S.A.
Securities Litigation.

Capital Invest, die
Kapitalanlagegesellschaft der Bank
Austrial Creditanstalt Gruppe GmbH,

Plaintiff-Petitioner-
Cross-Respondent,

v.

Vivendi Universal, S.A., *et al.*,

Defendants-Respondents-
Cross-Petitioners.

07-1419-mv (L)
07-1463-mv (con.)
07-1465-mv (con.)
07-1468-mv (con.)

Petitioners move pursuant to Fed. R. Civ. P. 23(f) for leave to pursue an interlocutory appeal of the district court's order granting in part and denying in part the plaintiffs' motion for class certification. The Chamber of Commerce of the United States of America moves for leave to file a brief in support of the petitions as amicus curiae. Upon due consideration, it is hereby ORDERED that the motion of the Chamber of

Commerce is GRANTED. It is further ORDERED that the Fed. R. Civ. P. 23(f) petitions are DENIED.

FOR THE COURT:
Thomas Asreen, Acting Clerk

By: /s/ Lucille Carr

APPENDIX B

REVISED MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ENTERED MAY 24, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x	02 Civ. 5571 (RJH) (HBP)
IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	**REVISED MEMORANDUM OPINION AND ORDER***
---------- x	

Plaintiffs bring this securities fraud class action against defendants Vivendi Universal, S.A. ("Vivendi") and its two most senior former officers, Jean-Marie Messier (former CEO) and Guillaume Hannezo (former CFO), individually and on behalf of similarly situated Vivendi security purchasers. Plaintiffs allege that defendants' materially false and misleading statements caused Vivendi securities to trade at artificially inflated prices, and further, that defendants induced them to purchase or otherwise acquire Vivendi securities pursuant to a registration statement and prospectus dated October 30, 2000, issued in connection with the December 8, 2000 three-way merger of Vivendi, Seagram Company Limited ("Seagram") and Canal Plus, S.A. ("Canal Plus"), in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, and Sections 11, 12(a) , and 15 of the Securities

* The Court's Memorandum Opinion and Order entered on March 26, 2007 is hereby revised to correct typographical errors on page two and sixty-eight that incorrectly stated that plaintiff's proposed class period begins on October 20, 2000; plaintiff's proposed class period begins on October 30, 2000.

Act of 1933 ("Securities Act"), as amended, 15 U.S.C. § 77k, respectively.[1]

Plaintiffs now move to certify a class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure consisting of all persons, foreign and domestic, who purchased or otherwise acquired ordinary shares or American Depository Shares ("ADSs") of Vivendi Universal, S.A. between October 30, 2000 and August 14, 2002. For the reasons discussed below, the Court grants plaintiffs' motion [234] in part and denies it in part.

BACKGROUND

Prior History

This litigation was commenced on July 18, 2002 with the filing of the original complaint. On August 19, 2002, plaintiffs filed an amended consolidated complaint. By Order dated October 1, 2002, the Hon. Harold Baer, Jr., to whom this action was originally assigned, consolidated fourteen related actions against Vivendi. On January 7, 2003, plaintiffs filed a consolidated class action complaint. Additional shareholder cases were consolidated herewith by Orders dated July 25, 2003 and September 3, 2003. By notice dated January February 24, 2003, defendants moved to dismiss the consolidated class action complaint arguing, *inter alia*, that the Court lacked subject matter jurisdiction over the claims brought by foreign class members who acquired Vivendi's ordinary shares on foreign exchanges. Applying the "conduct test" to determine whether extraterritorial application of the federal securities laws was warranted,

[1] The Section 12(a)(2) claim as alleged against defendant Hannezo in his individual capacity was dismissed in *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 187 (S.D.N.Y. 2003), and was not repleaded in the first amended consolidated class action complaint. (*See* Stipulation and Order [107] , Dec. 17, 2003.) The Section 12(a)(2) claim as alleged against defendant Messier remains.

Judge Baer, by opinion dated November 4, 2003, denied defendants' motion to dismiss for lack of subject matter jurisdiction. *See In re Vivendi Universal, S.A.*, 381 F. Supp. 2d at 169. Judge Baer concluded that plaintiffs' complaint adequately alleged that "'defendants' conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad.'" *Id.* (quoting *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991)); *see also id.* at 170 (inferring "that the alleged fraud on the American exchange was a 'substantial' or 'significant contributing cause' of [foreign investor's] decision[s] to purchase [Vivendi's] stock abroad") (bracketed language in original, citation omitted). Plaintiffs filed a first amended consolidated class action complaint ("FACC") on November 24, 2003. Shortly thereafter, on December 4, 2003 this case was reassigned to this Court. Defendants then moved for reconsideration of Judge Baer's order, which this Court denied by order dated September 21, 2004. The Court issued a separate Memorandum Opinion and Order addressing one of the many issues raised in defendants' motions for reconsideration; namely, whether this Court has subject matter jurisdiction over foreign plaintiffs' claims pursuant to Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. *See In re Vivendi Universal, S.A.*, No. 02 Civ. 5571 (RJH), 2004 WL 2375830 (S.D.N.Y. Oct. 22, 2004). In concluding that the claims of foreign class members who acquired Vivendi's ordinary shares on foreign exchanges were properly before the Court and subject to U.S. federal securities laws, the Court reasoned that the United States–based conduct alleged by plaintiffs "significantly contributed to the alleged fraud and that such conduct directly caused foreign investors' alleged losses." *Id.* at *7 (citing *Europe & Overseas Commodities Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128–29 (2d Cir. 1998)).

By notice dated July 15, 2005, plaintiffs filed a substituted motion to certify a class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure.[2] As noted, the proposed class consists of all persons who purchased or otherwise acquired Vivendi ordinary shares or ADSs between October 30, 2000 and August 14, 2002. The motion seeks appointment of plaintiffs Olivier M. Gerard, the Retirement System for General Employees of the City of Miami Beach ("RSMB"), Bruce Doniger, Gerard Morel, Capital Invest Die Kapitalanlagegesellschaft der Bank Austria Creditanstalt Gruppe GmbH (in its capacity as manager of and attorney-in-fact for APK EU-Big Caps Fund) ("Capital Invest"), and William Cavanagh (collectively, "proposed class representatives"), as class representatives, and Milberg, Weiss, Bershad & Shulman LLP and Abbey Gardy, LLP as class counsel. (*Id.*)

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[2] In the First Amended Consolidated Complaint, plaintiffs defined the proposed class as follows:

> (a) on behalf of themselves and all persons who purchased or otherwise acquired the common stock and American Depository Shares ("ADSs") of Vivendi (the "Purchaser Class") between October 30, 2000 and August 14, 2002 inclusive (the "Class Period"), alleging violations of the Securities Exchange Act of 1934 (the "Exchange Act"); (b) on behalf of themselves and all persons who acquired Vivendi's common stock or ADSs (the "Merger Subclass") pursuant to a registration statement and prospectus dated October 30, 2000 issued in connection with the three-way merger (the "Merger") of Vivendi, S.A., The Seagram Company Limited ("Seagram") and Canal Plus, S.A. ("Canal Plus") that created Vivendi Universal, S.A., alleging violations of the Securities Act of 1933 (the "Securities Act"); and (c) on behalf of themselves and all persons who were shareholders of Vivendi or Seagram as of November 25, 2000 and entitled to vote on the Merger (the "Proxy Subclass") pursuant to the Joint Proxy Statement-Prospectus issued in connection with the Merger, alleging violations of the Exchange Act.

(FACC ¶ 1.) Plaintiffs' class certification motion and supporting memoranda do not propose any subclasses for certification.

Factual Background

Vivendi is a corporation organized under the laws of France. It is a global conglomerate engaged in business in two primary areas: "Media and Communications" and "Environmental Services." (FACC ¶ 30.) Throughout the class period, Vivendi's total number of outstanding shares (ordinary shares and ADSs inclusive) was approximately 1.08 billion. (Declaration of François Bisiaux in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 30, 2005 ("Bisiaux Decl."), Exs. 1–5.) Approximately twenty-five percent of these were held by United States shareholders. (*Id.*) Around thirty-seven percent of Vivendi's total shares were held by French shareholders. (*Id.*) The remainder of Vivendi's shares were held predominantly by non-French but European persons or entities, and a small percentage (around five percent) was consistently held by shareholders in other unidentified countries. (*Id.*) During this time, virtually all of Vivendi's ADSs—which traded on the NYSE—were held by persons or entities in North America, while virtually all of Vivendi's ordinary shares—traded predominantly on the Paris Bourse—were held by persons or entities outside the United States, predominantly in France and the rest of Europe. (Bisiaux Decl. ¶ 7.)

Beginning in June of 1996, at which time defendant Messier became CEO and defendant Hannezo was CFO, Vivendi (then Générale des Eaux, and later, as of April 1999, Vivendi, S.A.) embarked upon a massive acquisitions venture, which included a number of multi-billion dollar purchases. (FACC ¶¶ 48–51.) Vivendi purchased substantial equity positions in several U.S. companies and non-U.S. companies by using Vivendi stock as payment and by borrowing cash against future earnings. Financing this growth strategy caused Vivendi to accumulate sizeable debt. (*Id.* ¶ 50.) Plaintiffs allege that in order to sustain Vivendi's growth strategy, the company was compelled to continue

reporting favorable financial results (*see id.* ¶ 53), resulting in a series of false and misleading public statements reporting "better than expected" and "strong" financial results, while consistently denying rumored problems (*see generally id.* ¶¶ 56–113), and the filing of financial statements with the United States Securities and Exchange Commission ("SEC") that were materially false and misleading because, *inter alia*, they failed to timely record goodwill impairments[3] and improperly applied generally accepted accounting principles ("GAAP") (*see generally id.* ¶¶ 54–55, 119–80).

As discussed in Judge Baer's prior opinion denying defendants' motion to dismiss, 381 F. Supp. 2d 158, and this Court's prior supplemental opinion denying defendants' motion for reconsideration, 2004 WL 2375830, the fraud alleged in the FACC was perpetrated, in important part, in the United States. Vivendi's rapid-expansion scheme involved the acquisition of numerous well-known U.S. entertainment and publishing companies, such as Universal Studios, Houghton Mifflin and USA Networks (FACC ¶ 23), and in order to successfully accomplish this plan, it took on a $21 billion debt while, allegedly, fraudulently assuring all investors through false and misleading reports filed with the SEC and news releases that it had sufficient cash-flow to manage its debts (*id.* ¶¶ 24, 54–192). Significantly, both of the alleged principal actors in this scheme, Messier and Hannezo, moved to the United States during 2001. Messier, in particular, moved his primary residence to New York in September 2001, and spent half of his time in the United States from that time through the end of the class period (August 31, 2002), for the stated purpose of increasing

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[3] Goodwill is the excess of the purchase price over the fair market value of an asset. It reflects the value of intangible assets like reputation, brand name, good customer relations, good employee relations, any patents and proprietary technology, and other intangibles that improve a company's business. Goodwill is a value in a company's balance sheet, and is amortized over a period of time.

United States investments in Vivendi. (*Id.* ¶¶ 69, 77, 90–92, 105.) Many of the statements alleged to be false and misleading were made by defendant Messier after he had moved to New York. *See* 2004 WL 2375830, at *4; (*see also* FACC ¶¶ 73–76, 81–97.)

Following the December 8, 2000 merger of Vivendi, Seagram, and Canal Plus, Vivendi repeatedly predicted "strong growth prospects" and touted financial results as exceeding even their "too ambitious" expectations. (*Id.* ¶ 57–68.) In September 2001—the same time that Messier and Hannezo moved to the United States—rumors began to circulate that Vivendi's earnings would be disappointing. Messier responded by consistently denying any problems—indeed, until the day before his ultimate resignation he disavowed there was any serious problem—which quelled some of the negative speculation. (*See id.* ¶¶ 73–77.) In late 2001, Vivendi announced its acquisition of USA Networks for $10.3 billion, and reported that the transaction would increase Vivendi's net free cash flow by a projected $350 million. (*Id.* ¶¶ 80–81.) Throughout the spring of 2002, Vivendi (and Messier) continued to make positive statements in the press to "dispel concerns about the Compan[y's] debt levels and accounting practices." (*Id.* ¶83; *see also id.* ¶¶ 84–87, 89, 94–97.) However, on May 3, 2002, Moody's lowered Vivendi's long-term debt rating to one notch above "junk" status assigned to speculative investments, due to concerns that Vivendi "might not be able to reduce debts as quickly and comprehensively as planned." (*Id.* ¶ 99.) In response, Vivendi downplayed the rating and announced it had "no impact on Vivendi Universal's cash situation," which it described as "comfortable" and capable of financing Vivendi's continued debt reduction. (*Id.* ¶¶ 100, 102–03.)

In response to continued concerns about Vivendi's debt levels, a June 25, 2002 press release was issued, noting steps taken to reduce debt and that its cash situation was not precarious, and Messier held a June 26, 2002 conference call

to assure investors there was "no hidden liability" and expressing confidence with respect to Vivendi's debt and cash outlook. (*Id.* ¶¶ 104–05.) On July 2, 2002, Messier e-mailed his employees stating that despite reports that Vivendi was in danger of default, there were no hidden risks in the company's accounting. (*Id.* ¶ 109.) The very next day, however, Messier resigned and Vivendi's securities prices collapsed. (*Id.*) Vivendi issued a press release through new management acknowledging its "short-term liquidity issue," though Messier continued to claim that Vivendi's financial statements were transparent. (*Id.* ¶ 110.) Contrary to Vivendi's numerous press releases, financial statements, and SEC filings throughout the class period, plaintiffs allege that the company was in fact on the brink of financial disaster. At the time of the USA Networks acquisition, announced on December 17, 2001 (*id.* ¶ 8), "Vivendi was already in dire financial straits," despite representations made to the contrary by Messier to investors and the board of directors (*id.* ¶ 184). Vivendi was allegedly on the verge of insolvency by the end of 2001, and had barely enough "cash needed to pay the bills" as of May 2002. (*Id.* ¶ 185.) Nevertheless, Vivendi had continued to reassure investors that it could meet its obligations for the next twelve months, despite being privately advised of its dire financial outlook. (*Id.* ¶ 186.)

On August 14, 2002, new management announced that Vivendi had suffered a €12 billion net loss for the first half of 2002 and would take a €11 billion goodwill write-down of depreciated assets, the same day that Standard & Poor's rated Vivendi's long-term corporate credit at junk status. (*Id.* ¶ 114.) New management later admitted that Vivendi "would have been forced to declare bankruptcy within 10 days if Jean-Marie Messier had not resigned." (*Id.* ¶ 187.)

DISCUSSION

I. Legal Standard

A district court's analysis of a class certification request generally proceeds in two steps, both of which are governed by Rule 23 of the Federal Rules of Civil Procedure. As a threshold matter, the court must be persuaded, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). Rule 23(a) provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

If a court determines that the Rule 23(a) requirements have been met, it must then decide whether the class is maintainable pursuant to one of the subsections of Rule 23(b), which govern, *inter alia*, the form of available relief and the rights of absent class members. When seeking to certify a class pursuant to Rule 23(b)(3), plaintiffs must meet the following two additional criteria: (1) questions of law or fact common to class members must predominate over any questions affecting individual members; and (2) the class action device must be superior to any other method of adjudication. Fed. R. Civ. P. 23(b)(3). The requirement of "rigorous analysis" to ensure "actual, not presumed conformance" with Rule 23(a) applies with "equal force to all Rule 23 requirements, including those set forth in

Rule 23(b)(3)." *Miles v. Merrill Lynch & Co. (In re Initial Public Offering Sec. Litig.)*, 471 F.3d 24, 33 & n.3 (2d Cir. 2006) (citing *Falcon*, 457 U.S. at 160–61). Thus it is not sufficient for plaintiffs to make merely "some showing" that the requirements of Rule 23 have been met. *Id.* at 35–36 (citing and distinguishing *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 292 (2d Cir. 1999) and *In re Visa Check/Master Money Antitrust Litigation*, 280 F.3d 124, 134-35 (2d Cir. 2001)). To the contrary, the following standard now applies to class certification motions in this circuit:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.

In re IPO Sec. Litig., 471 F.3d at 41. With these principles in mind, the Court turns to the Rule 23 analysis.

II. Rule 23(a)

A. Numerosity

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticability means difficulty or inconvenience of joinder [not] . . . impossibility of joinder," *In re Blech Sec. Litig.*, 187 F.R.D. 97, 103 (S.D.N.Y. 1999) (citation omitted), and the Second Circuit has observed that "numerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), *cert. denied*, 515 U.S. 1122 (1995) (citing 1 *Newberg on Class Actions* § 3.05 (2d ed. 1985)); *see also Presbyterian Church v. Talisman Energy, Inc.*, 226 F.R.D. 456, 466 (S.D.N.Y. 2005) ("Numerosity is presumed when a class consists of forty or more members."). "Precise quantification of the class members is not necessary because a court may make common sense assumptions regarding numerosity." *In re Blech Sec. Litig.*, 187 F.R.D. at 103 (citations omitted); *see also de la Fuente v. DCI Telecomms., Inc.*, 206 F.R.D. 369, 390 (S.D.N.Y. 2002); *Weissman v. ABC Fin. Servs., Inc.*, 203 F.R.D. 81, 84 (E.D.N.Y. 2001).

"In securities fraud class actions relating to publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *Teachers' Ret. Sys. of La. v. ACLN Ltd.*, No. 01 Civ. 11814 (LAP), 2004 WL 2997957, at *3 (S.D.N.Y. Dec. 27, 2004) (citations and internal quotation marks omitted)); *see also In re Globalstar Sec. Litig.*, No. 01 Civ. 1748 (PKC), 2004 WL 2754674, at *3–*4 (S.D.N.Y. Dec. 1, 2004) ("[I]t is not unusual for district courts to certify plaintiff classes in securities actions based on the volume of outstanding shares." (citations omitted)); *In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277 (S.D.N.Y. 2002) ("Class certification is frequently appropriate in

securities fraud cases involving a large number of shares traded publicly in an established market."); *In re Frontier Group Ins., Inc. Sec. Litig.*, 172 F.R.D. 31, 40 (E.D.N.Y. 1997). With more than 107 million ADSs and approximately 1 billion ordinary shares outstanding during the relevant class period, plaintiffs have established that joinder is impracticable and that the proposed class satisfies the numerosity requirement. (*See* FACC ¶ 41; Bisiaux Decl. Ex. 2 (indicating 1.086 billion outstanding Vivendi shares, ordinary shares and ADSs inclusive, as of June 30, 2001).)

B. Commonality

The class certification prerequisite of commonality requires that "there are questions of law or fact common to the class . . . ." Fed. R. Civ. P. 23(a)(2); *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (per curiam) ("[P]laintiffs' grievances [must] share a common question of law or of fact."). Not every "issue[] must be identical as to each [class] member, but . . . plaintiff [must] identify some unifying thread among the members' claims that warrants class treatment." *Cutler v. Perales*, 128 F.R.D 39, 44 (S.D.N.Y. 1989) (internal quotation marks and citation omitted). The commonality requirement "has been applied permissively" in securities fraud litigation. *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855 (RMB), 2003 WL 22077464, at *3 (S.D.N.Y. Sept. 8, 2003) (internal quotation marks omitted); *see also In re Frontier*, 172 F.R.D. at 40. Here, plaintiffs allege the following questions of fact or law are common to all members of the proposed class: (1) whether defendants violated the securities laws by the acts and conduct alleged in the FACC; (2) whether defendants issued false and misleading statements during the class period; (3) whether defendants acted with scienter in issuing materially false and misleading statements; (4) whether the market prices of Vivendi ordinary shares and ADSs during the class period were artificially inflated because of defendants' misconduct, and (5) whether the

members of the class sustained damages, and, if so, what is the appropriate measure of damages. (FACC ¶ 45.) *Cf. In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 2003 WL 22509414, at *3 (S.D.N.Y. Nov. 6, 2003) (finding commonality requirement satisfied where plaintiffs raised common issues as to whether defendants' public filings and statements contained material misstatements, whether the defendants acted with scienter in misrepresenting material facts in the company's public filings and press releases, and whether the damages to the investors were caused by the defendants' misstatements); *In re Ashanti Goldfields Sec. Litig.*, No. CV 00-0717 (DGT), 2004 WL 626810, at *12 (E.D.N.Y. Mar. 30, 2004) (finding commonality on similar allegations). Defendants do not dispute commonality. Plaintiffs have adequately demonstrated that these claims are common to the members of the proposed class, and the Court finds the commonality requirement is satisfied.

C. Typicality and Adequacy

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "While the commonality inquiry establishes the existence of a certifiable class, the typicality inquiry focuses on whether the claims of the putative class representatives are typical of the class sharing common questions." *In re Frontier*, 172 F.R.D. at 40. Typicality requires that "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *Marisol A. v. Giuliani*, 929 F. Supp. 662, 691 (S.D.N.Y. 1996), *aff'd* 126 F.3d 372 (2d Cir. 1997); *see also Robidoux v. Celani*, 987 F.2d 931, 936–36 (2d Cir. 1993) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims."). Rule 23(a)(4) requires plaintiffs to establish that "the

representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This showing requires that plaintiffs demonstrate that the proposed class representatives have no "interests [that] are antagonistic to the interest of the other members of the class." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). As many courts have observed, the issues of typicality and adequacy tend to merge because they "serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13.

In this case, proposed class representatives argue that the typicality requirement is met because their claims "arise out of the same uniform pattern of conduct—i.e., defendants' failure to disclose that Vivendi's operations and financial condition were dramatically weaker than what their public statements portrayed." (Pls.' Supp. Mem. 11.) In the First Amended Consolidated Complaint, named plaintiffs, like the other purported class members, have asserted that they purchased or otherwise acquired Vivendi securities during the class period, and were injured by defendants' false and misleading representations made throughout the class period in violation of the securities laws. Central to all the proposed class representatives claims is defendants' alleged course of conduct throughout the class period. In prosecuting their case, plaintiffs will necessarily seek to develop facts relating to the alleged accounting irregularities and the dissemination of allegedly false or misleading statements underlying their claims. Such allegations are generally considered sufficient to satisfy the typicality requirement. *See, e.g., In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 2003 WL 22509414, at *3 (S.D.N.Y. Nov. 6, 2003); *In re WorldCom Inc. Sec. Litig.*, 219 F.R.D. 267, 280–81 (S.D.N.Y. 2003). Furthermore, defendants' individualized arguments regarding the adequacy and typicality of the proposed class representatives are unavailing. The Court will address

seriatim the arguments made with respect to the six named plaintiffs.

1. Olivier Gerard

Proposed class representative Gerard is a resident of France who, on December 11, 2000, exchanged Vivendi, S.A. shares for Vivendi Universal shares pursuant to the three-way merger with Seagram and Canal Plus. (*See* Deposition of Olivier Marie-Guillaume Gerard, June 24, 2005 ("Gerard Dep.") at 81:05–82:13; Gerard Second Corrected Certification, June 24, 2005 at Schedule A, Zach Decl. Ex. 7.)

Defendants submit that Gerard is not an adequate class representative for two reasons. First, defendants argue that persons such as Gerard who obtained Vivendi Universal shares and/or ADSs only in the one-to-one exchange of Vivendi, S.A. securities may not be properly included in the putative class, because such persons[4] did not suffer economic damage and cannot prove materiality. (*See* Defs.' Opp'n Mem. ("Opp'n") 21–23, 27.)

Defendants argue that this group of class members, as preexisting Vivendi shareholders, "cannot show that the alleged misstatement inflating the value of shares or ADSs that they already owned was material to them or caused them any economic damage." (Opp'n 21.)

Plaintiffs propose as a solution to defendants' concerns that the words "and were damaged thereby" be inserted into the class definition. Plaintiffs also argue that it would be premature to exclude class members who have exchanged Vivendi S.A. shares for Vivendi Universal shares because the

[4] Defendants' contention that all foreign persons should be excluded from the proposed class is discussed *infra* in connection with an evaluation of whether a class action including foreign shareholders would be superior to alternative methods of adjudication.

question of whether defendants' misstatements were material to these plaintiffs cannot be determined at the class certification stage.

Given the teaching of *In re IPO Sec. Litig.*, 471 F.3d at 41–42, it is not inappropriate to consider either damages or materiality in assessing the typicality of the individual plaintiffs' claims, even though some assessment of the merits of their claims is required. However, the Court is not persuaded that either issue precludes a finding that the typicality requirement is satisfied here. Materiality for all class members will turn on the nature and accuracy of all defendants public statements including, obviously, those made in connection with the three-way merger of Vivendi, Seagram and Canal Plus in December, 2000. That Vivendi S.A. shareholders received Vivendi Universal shares as a result of the merger does not alter the materiality of defendants alleged misstatements to plaintiff-shareholders' decision to approve the merger and accept shares in a new entity. And to the extent that, as alleged, defendants were constructing an ever-expanding house of cards, old Vivendi S.A. shareholders who accepted shares in Vivendi Universal were likely damaged thereby.[5] Therefore, the Court declines

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[5] In addition to opposing the inclusion of those who acquired Vivendi shares through the one-for-one exchange, defendants oppose the inclusion of so-called in-and-out purchasers in any class certified—i.e., those who purchased shares and sold them during the class period. Defendants do not oppose the appointment of any of the proposed class representatives on this basis. However, even if they did raise such an argument, courts have consistently found that this does not render a representative's claim atypical. *See, e.g., In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 69–71 (S.D.N.Y. 1999) (rejecting defendants' argument that in-and-out purchaser proposed as class representative was inadequate because, *inter alia*, he was not injured because he sold as well as purchased at inflated prices); *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1215 (S.D.N.Y. 1992) (rejecting attempt to disqualify proposed class representatives because of the timing of their purchases, and stating that although timing issues could eventually surface differing interests among class members, "the greater weight of recent authority militates

to exclude members of the class who acquired their shares in the one-to-one exchange, including Gerard as class representative, on the basis of defendants' arguments regarding damages or materiality.

Defendants also allege that Gerard is incapable of performing the fiduciary responsibilities as a class representative because Gerard admitted to destroying documents. (Opp'n 27–28 n.23.) The documents to which defendants allude, however, appear to be French and other European newspaper articles relating to the Vivendi scandal, and perhaps some personal notes taken by Gerard during meetings with his French attorney. (Gerard Dep. 28:24–29:16, 30:23–31:02.) Gerard testified that he discarded the news articles because he believed the attorneys in this matter had collected all the relevant documentation and articles published in the press, and there was no reason for him to keep it. (*Id.* at 29:11–30:05.) Defendants cite no authority to support the proposition that such conduct renders Gerard inadequate to represent the interests of the class, and the Court finds Gerard to be an adequate class representative. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 88 (S.D.N.Y. 2004) (rejecting defendants' credibility argument to defeat appointment of named plaintiff as class representative where "[t]here [was] no evidence that any of the conduct here was the result of bad faith or an attempt to deceive defendants or the court").

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denying class certification on that ground" (internal citation omitted)); *In re Sumitomo Copper Litig.*, 182 F.R.D. 85 (S.D.N.Y. 1998) (rejecting defendants' arguments regarding conflicts created by inclusion of in-and-out purchasers in proposed subclasses and noting that "it is well settled in this Circuit that factual differences in the amount of damages, date, size or manner of purchase, the type of purchaser, the presence of both purchasers and sellers, and other such concerns will not defeat class action certification when plaintiffs allege that the same unlawful course of conduct affected all members of the proposed class" (citing *Green v. Wolf*, 406 F.2d 291, 299–301 (2d Cir. 1968), *cert. denied sub nom. Troster, Singer & Co. v. Green*, 395 U.S. 977 (1969))).

2. Gerard Morel

Gerard Morel is also a French resident who exchanged his shares in Vivendi, S.A. and Canal Plus for Vivendi Universal shares after the December 2000 merger. (Declaration of Gerard Morel, Feb. 19, 2005 ("Morel Decl.") at Schedule A, Zach Decl. Ex. 8.) He also bought and sold Vivendi ordinary shares on the Paris Bourse during the proposed class period. (*Id.*) His last transaction in Vivendi securities occurred on January 11, 2002. (*Id.*)

Defendants argue that Morel only has standing to represent a class including Europeans who purchased Vivendi securities on a European exchange up to the latest date on which he engaged in a transaction involving Vivendi stock. (Opp'n 28.) Without an adequate proposed class representative who purchased Vivendi ordinary shares on the Paris Bourse after January 11, 2002, defendants argue, the period of any class including French shareholders cannot extend beyond this date.[6] Defendants further argue that inconsistencies in Morel's testimony, submissions, and document production on the issue of his transactions in Vivendi securities will become a focal point of cross-examination and unique defenses at trial to the detriment of the class. (*Id.* at 28 n.25.)

With respect to class representative standing, it is well established that where, as here, plaintiffs allege that their losses were the result of a sustained course of conduct that propped up defendant's stock price throughout the class period, the class may be represented by an individual who purchased his shares prior to the close of the class period. *See Robbins v. Moore Med. Corp.*, 788 F. Supp. 179, 187 (S.D.N.Y. 1992) (finding class representatives entitled to

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[6] Defendants, as noted, object to the inclusion of any foreign shareholders in the proposed class. See *supra*, fn. 5, and the discussion of the issue of superiority, *infra*.

assert Section 10(b) claims "arising from statements made both before and after the purchase date if the statements allegedly were made in furtherance of a common scheme to defraud" (citing *Nicholas v. Poughkeepsie Savings Bank/FSB*, No. 90 Civ. 1607 (RWS), 1990 WL 125154, at *5 (S.D.N.Y. Sept. 27, 1990))); *Zucker v. Sasaki*, 963 F. Supp. 301, 306–07 (S.D.N.Y. 1997) (discussing *Robbins* and noting that where defendants with an identity of interest make a series of "inter-related misstatements" as part of a "common course of conduct," post-purchase statements are relevant to the course of wrongful conduct alleged); *cf. Denny v. Barber*, 576 F.2d 465, 468–69 (2d Cir. 1978) (finding that proposed class representative could not properly represent persons who bought securities in reliance on fraudulent statements where he had purchased before *any* alleged false statements were made). As such, the Court finds that Morel may adequately represent later purchasers. *See Nicholas*, 1990 WL 145154, at *6 (rejecting implication that only someone who bought on the last day of the class period would be able to bring an action on her own behalf or on behalf of the entire class, and stating "there is considerable authority allowing class plaintiffs to represent later purchasers" (internal citations omitted)).

3. Capital Invest

Capital Invest, the fund management company of the Bank Austria Greditanstalt Gruppe GmbH ("Bank Austria"), seeks to represent the claims of APK EU–Big Caps fund ("Big Caps Fund"), in its capacity as manager and attorney-in-fact. (Declaration of Irene Reisenberger, August 30, 2005 ("Reisenberger Decl.") ¶ 2, Zach Decl. Ex. 12.) The sole owner of the shares (i.e., units) in the Big Caps Fund is a large Austrian pension entity known as APK Pensionskasse Aktiengesellschaft ("APK"). The Big Caps Fund obtained Vivendi Universal shares in exchange for previously held Vivendi, S.A. shares, and also purchased and sold Vivendi Universal shares on foreign exchanges, the last purchase of

which occurred on January 21, 2002. (Zach Decl. Exs. 15, 16.) For reasons discussed in greater detail below, Austrian claimants shall be excluded from the class in this action. Therefore, the Court finds it unnecessary to address typicality/adequacy of representation issues as they relate to this plaintiff as it cannot properly serve as a class representative.

4. William Cavanagh

William Cavanagh is a United States resident. He purchased 100 Vivendi Universal ADSs on the NYSE on June 13, 2002. (Zach Decl. Ex. 31, at 21; Deposition of William Cavanaugh, July 29, 2005, Parr Decl. Ex. 24 ("Cavanaugh Dep.") at 170:23–171:07.) Defendants dispute Cavanagh's adequacy as a class representative because of his "striking" lack of knowledge regarding his claim. (Opp'n 34.) Defendants cite the following examples in support of this argument: (1) Cavanagh's inability to recall the year the complaint was filed, the relevant dates for the proposed class period, or how he decided to seek to become a proposed class representative, or to articulate key elements of the claims; (2) Cavanagh's similar inability to testify regarding his transactions in Vivendi securities beyond testifying that he sold his 100 Vivendi Universal shares at some point, though he did not know when or at what price (Cavanaugh Dep. 259:23–260:11, 181:14–182:03); (3) Cavanagh's failure to monitor class counsel, as evidenced by his inability to recollect ever meeting or speaking with any attorney associated with the Milberg Weiss law firm, and only works with attorneys from the law firms of Murray Frank and Abbey Gardy (*id.* at 15:25–16:19, 278:25–280:02).

"The Supreme Court . . . expressly disapproved attacks on the adequacy of a class representative based on the representative's ignorance." *Baffa*, 222 F.3d at 61 (citing *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 370–74 (1966)). Courts in this district have held that "[p]laintiffs are

entitled to rely on the 'expertise of counsel,'" and "a class representative will be found inadequate due to ignorance only when they 'have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *In re Worldcom Inc. Sec. Litig.*, 219 F.R.D. 267, 286 (S.D.N.Y. 2003) (quoting *Baffa*, 222 F.3d at 61); *accord Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077–78 (2d Cir. 1995). "[I]t is well established that 'in complex litigations such as securities actions, a plaintiff need not have expert knowledge of all aspects of the case to qualify as a class representative, and a great deal of reliance upon the expertise of counsel is to be expected.'" *Fogarazzo v. Lehman Bros., Inc.*, 232 F.R.D. 176, 181 (S.D.N.Y. 2005) (quoting *In re AM Int'l, Inc. Sec. Litig.*, 108 F.R.D. 190, 196–97 (S.D.N.Y. 1985)).

Despite defendants' concerns regarding Cavanaugh's imperfect recollections outlined above, there is nothing in the record to suggest that Cavanaugh is unwilling or unable to pursue the litigation on behalf of the class. Cavanaugh's deposition testimony reflects that he is aware that he is a proposed class representative (Cavanaugh Dep. 97:22–97:24), he understands the role carries an obligation "to represent the class members to the best of [his] ability, in discussions with [his] attorney" and an obligation to supervise class counsel (*id.* at 278:04–278:09, 278:25–279:04), he knows the action is against Vivendi and its former CEO and CFO and is aware of the claims (*id.* at 117:20–117:25, 254:10–255:22; 306:02–306:08), and expressed a desire to "vigorously" pursue the case, in consultation with counsel (*id.* at 306:02–306:08). *Cf. Baffa*, 222 F.3d at 62. Defendants' criticism that Cavanaugh is only in communication with one of the two firms appointed as class counsel is insignificant. In light of the foregoing, the Court finds Cavanaugh to be an adequate class representative.

5. RSMB

RSMB administers the pension fund of the retirement system for the general employees of Miami Beach, Florida. In the December 2000 merger, RSMB exchanged Vivendi, S.A. and Canal Plus ADSs for Vivendi Universal ADSs in the three-way merger. (Zach Decl. Ex. 33 at 3.) RSMB did not acquire any other Vivendi Universal securities during the proposed class period. As such, defendants argue that RSMB could only represent North American residents who acquired Vivendi Universal ADSs as part of the merger and does not have standing to bring claims based on alleged misstatements issued after the exchange of shares pursuant to the merger. As discussed *supra* in section 2.C.ii. (discussing adequacy of proposed class representative Gerard Morel), these arguments are unpersuasive in a case such as this, where a common scheme to defraud renders later-made statements relevant to the course of wrongful conduct underlying an earlier purchaser's (or acquirer's) claims.[7]

Defendants further argue that RSMB is an inadequate class representative because RSMB's "most knowledgeable" representative, Rick Rivera, RSMB's pension administrator, lacks sufficient knowledge to demonstrate RSMB is an adequate class representative. Defendants contend that Rivera's testimony demonstrates that RSMB does not understand important aspects of this action or the responsibilities attendant to being a class representative.[8]

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[7] The Court notes that RSMB stands in a slightly different position from Morel in that it held both Vivendi S.A. and Canal Plus shares at the time of the merger. This distinction does not alter the Court's analysis of materiality, damages, or a shareholder's ability to adequately represent shareholders who purchased later in the class period.

[8] For example, Rivera could not (1) describe the scope of the proposed class (Rivera Dep. 107:15–108:07); (2) identify any document relevant to the action that RSMB has reviewed, or state with any certainty that RSMB reviewed the complaint (or understand the term "complaint") (*id.* at 27:07–27:20, 58:02–58:04); (3) state with any certainty that RSMB

However, plaintiffs have established that Rivera understands that the pension fund seeks to be appointed a class representative, in which capacity it would seek damages on behalf of the entire class, and that his responsibilities would include following the case, reviewing documents and filings, and consulting with counsel. (Deposition of Rick Rivera, May 20, 2005 ("Rivera Dep.") 152:21–153:14, 150:02–150:11.) He also understood that as class representative RSMB would have to represent the best interests of the class, which includes all members who sustained damages as a result of Vivendi's alleged fraud. (*Id.* at 153:24–154:03, 107:03–108:07.) He also understood that the complaint alleges that "defendants provided false statements that inflated the stock price." (*Id.* at 59:15–59:23.) The Court has been presented with no evidence suggesting that RSMB will be unable or unwilling to adequately represent the class, or that RSMB has interests antagonistic to those of the class as a whole, which are the relevant inquiries at issue here. The lack of knowledge of which defendants complain does not rise to the sort of ignorance that warrants denial of class representative status. *See, e.g., In re Worldcom*, 219 F.R.D. at 286.

6. Bruce Doniger

Bruce Doniger is a resident of the United States. Doniger acquired Vivendi Universal ADSs in exchange for his previously held Seagram shares following the December

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read its responses to defendants' interrogatories, though he personally verified the responses (*id.* at 73:08–73:25); (4) identify how many times RSMB has spoken with plaintiffs' counsel, or whether RSMB had ever done so within the last year (*id.* at 57:03–57:25); (5) identify the number of shares RSMB acquired during the proposed class period, or when such shares were acquired or sold (*id.* at 85:14–86:09); (6) state with certainty whether RSMB had disposed of all its Vivendi securities during the proposed class period (*id.* at 185:16–186:02); (7) describe the interests of the class members or how RSMB would determine those interests (*id.* at 124:16–124:10).

2000 three-way merger. Defendants argue that Doniger lacks standing to bring claims for alleged misstatements made after he exchanged his shares, and note that there are no other representatives with standing to represent post–December 2000 claims. This argument has already been addressed and rejected by the Court.

Defendants also point out that Doniger is a second cousin to Edgar Bronfman, Sr. and Charles Bronfman (father and uncle, respectively, to Edgar Bronfman, Jr.) and sponsor of former Vivendi Board member Samuel Minzberg. Prior to the December 2000 merger, the principal owners of Seagram were Edgar Bronfman, Jr. and the Bronfman family, which became the largest shareholders of Vivendi following the merger. (FACC ¶ 51.) Edgar Bronfman, Jr. held the position of Executive Vice Chairman of the Vivendi Board until December 2001, at which time he resigned. (FACC ¶ 79.) Defendants further state that Doniger received his Seagram shares because of his familial relationships. (Doniger Dep. 20:03–23:10, 38:23–39:08, 101:11–102:11.) Based on these relationships, defendants appear to argue that Doniger would be subject to unique defenses likely to become the focus at trial, rendering him atypical and prejudicing absent class members. However, defendants do not point to any evidence that Doniger is subject to unique defenses concerning, for example, lack of reliance because of the receipt of nonpublic information obtained by virtue of these relationships. *Cf. Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 475–76 (S.D.N.Y. 1989) (finding proposed class representatives atypical where their deposition testimony reflected that they had received nonpublic information and recommendations from friends and associates). Furthermore, the Court does not find that Doniger's familial relationships, without more, are sufficient to conclude that Doniger has interests antagonistic to those of the class, or that he would be unwilling or unable to fairly and adequately represent the class.

III. Rule 23(b)(3)

Having addressed the requirements of Rule 23(a), the Court now turns to whether Rule 23(b)(3) has been satisfied. Rule 23(b)(3) requires a court to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b). A class certified pursuant to Rule 23(b)(3) is sometimes referred to as an "opt-out" class because Rule 23(c)(2) mandates that members of a class certified under Rule 23(b)(3) be afforded an opportunity to "request exclusion" from that class.[9] Particularly relevant to a purported class including foreign purchasers, anyone who does not affirmatively inform the Court that they wish to be excluded from the class is bound by the final disposition of the case.

A. Predominance of Common Issues

Rule 23(b)(3) allows for certification of a class where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy . . . [and] tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). The Rule 23(b)(3) predominance inquiry "is a more demanding criterion than the commonality inquiry under Rule 23(a). Class-wide issues predominate if resolution of some of the legal or factual questions that

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[9] Rule 23(c)(2)(B) provides, in relevant part, that notice to members of "any class certified under Rule 23(b)(3) . . . must concisely and clearly state in plain, easily understood language . . . that the court will exclude from the class any member who requests exclusion."

qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. Paine Webber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (internal citations and quotation marks omitted). However, the Supreme Court has noted that "[p]redominance is a test readily met in certain cases alleging . . . securities fraud." *Amchem Prods.*, 521 U.S. at 625 (citing Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 385).

In this case, there are common questions of law and fact involving violations of the securities laws based on a common course of conduct directed at the entire class, and that predominate over any individualized questions that may exist. The common issues in this action include whether defendants issued materially false and misleading statements as to Vivendi's earnings (both in connection with a registration statement and prospectus dated October 30, 2000, and thereafter), scienter, reliance, and causation. All plaintiffs will rely on the same or substantially similar documents, statements, and legal theories to prove the defendants' liability. Defendants do not present any argument that the claims at issue here may not be largely resolved by class-wide proof. Indeed, they do not appear to contest that the predominance requirement in met in this case. Because common factual and legal questions predominate over individual issues, the Court determines that this requirement has been satisfied. *See, e.g., In re AOL Time Warner, Inc. Sec. and ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *5 (S.D.N.Y. Apr. 6, 2006) (finding predominance requirement readily met because "allegations of defendants' misrepresentations and the improper inflation of AOL's accounting revenues underlie the factual and legal claims of every Class Member"); *In re Globalstar Sec. Litig.*, No. 01 Civ. 1748 (PKC), 2004 WL 2754674, at *5 (S.D.N.Y. Dec. 1, 2004) (finding predominance prong met where there were common issues with respect to whether defendants

issued materially false and misleading statements as to Globalstar's subscription rate and revenues, scienter, reliance, and causation).

B. Superiority of Class Action Treatment

The superiority requirement asks courts to balance, in terms of fairness and efficiency, the advantages of a class action against those of alternative available methods of adjudication. *See* Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 385 ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."). Rule 23(b)(3) identifies several factors to consider in determining whether a class action is in fact "superior to other available methods for the fair and efficient adjudication of the controversy":

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3). This list of pertinent factors is nonexhaustive, *see* Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 386 (1992), "and the purposes of Rule 23 should weigh heavily in this determination," 2 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 4:28 (4th ed. 2002).

1. Interests in Prosecuting Individual Suits; the Extent and Nature of Other Pending Litigation

As the advisory committee's notes to Rule 23 indicate, "[t]he court is to consider the interests of the individual members of the class in controlling their own litigations and carrying them on as they see fit." Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 386. In considering this interest, "the court should inform itself of any litigation actually pending by . . . the individuals," because the existence of pending actions may reveal that "[t]he interests of individuals in conducting separate lawsuits [are] so strong as to call for denial of a class action." *Id.*; *see also In re "Agent Orange" Prod. Liability Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) ("All plaintiffs may not desire class certification . . . because those with strong cases may be better off going it alone.").

As courts have frequently noted, class action treatment is particularly appropriate when plaintiffs seek redress for violations under the securities laws. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 382 (1970); *Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968) ("[A] class action in a federal securities action may well be the appropriate means for expeditious litigation of issues, because a large number of individuals may have been injured, although no one person may have been damaged to a degree which would have induced him to institute litigation solely on his own behalf."); *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) ("[C]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, since the effectiveness of the securities laws may depend in large measure on the application of the class action device." (internal quotation marks and citations omitted)); *In re Blech*, 187 F.R.D. at 101; *Baron v. Commercial & Indus. Bank of Memphis*, No. 75 Civ. 1274 (LBS), 1978 WL 168588, at *2 (S.D.N.Y. Aug. 21, 1978) ("Because most securities fraud

cases involve purchasers' claims which might otherwise be too paltry to justify individual litigation, courts have concluded in securities actions, the class action procedure is not only superior, but probably indispensable for the vindication of plaintiffs' rights . . . and to assure that the securities laws will be vigorously enforced." (internal quotation marks and citation omitted)); 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.03 (3d ed. 2004). In a case such as this, where each individual plaintiff can only have a fraction of the interest in the outcome of the litigation as the defendants, any interest the members of the class might have in individually controlling the prosecution of separate actions is heavily outweighed by the obvious benefits of pressing their claims as a class. *See Amchem*, 521 U.S. at 617 ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997))).

The actions by putative class members currently pending before French courts against Vivendi do not, in the Court's view, change this calculus. According to submissions made by both parties, at present Vivendi is defending two individual shareholder suits filed in the Paris Tribunal de Grande Instance (trial court) in France, *Société Richard Hugo v. Vivendi Universal, S.A. and Courage v. Vivendi Universal, S.A.* (Bisiaux Decl. ¶¶ 12–13 & Exs. 8–9).[10] The pendency of these actions does not persuade the Court that any individual shareholder has an interest in conducting separate lawsuits

[10] A third action, *Pasturaud v. Vivendi Universal, S.A.*, a suit by ninety-seven individual shareholders, was dismissed without prejudice due to plaintiffs' failure to register the complaint. (Defs.' Sur-Reply Mem. 1 n.1.)

sufficient to outweigh the advantages to all shareholders of proceeding on a class basis. *See*, Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 386 (noting that even where additional litigation is pending, the interests in conducting separate lawsuits may be "theoretical rather than practical" because, *inter alia*, "the amounts at stake for individuals may be so small that separate suits would be impracticable").

2. Desirability or Undesirability of Concentrating the Litigation of the Claims in this Particular Forum

Plaintiffs' proposed class definition encompasses a significant number of foreign class members; indeed, thirty-seven percent of Vivendi's ordinary shares were held by citizens of France who purchased them on the Bourse, while U.S. investors held twenty-five percent of Vivendi shares in the form of ADSs purchased on the NYSE. (Bisiaux Decl. ¶ 7.) Relying primarily on Judge Friendly's opinion in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975), defendants argue that all foreign plaintiffs must be excluded from the class because it is a "near certainty" that if this action is dismissed, taken to judgment, or settled, defendants would not be able to assert claim prelusion to bar subsequent actions in the countries in which foreign plaintiffs reside. Although defendants do not consistently characterize their argument as such, the Court will consider this aspect of their opposition to be an attack on the superiority of class action treatment of the claims of foreign purchasers.

(a) The "Near Certainty" Test

Bersch involved an action on behalf of all purchasers of stock in a Swiss-based, Canadian corporation asserting claims for violations of the federal securities laws relating to stock offerings made outside the United States. The proposed class included approximately 50,000 purchasers of whom

386 were American and the balance of whom were foreigners. *Id.* at 977–78 n.2. The Court first determined that federal securities laws did *not* reach losses from sales of securities to foreigners outside the United States because no acts occurred within the United States directly causing such losses, *see id.* at 986–90. Having dismissed these federal securities law claims for lack of subject matter jurisdiction, the Court then addressed whether the class might still be certified to include foreign purchasers with respect to their state law claims. The *Bersch* plaintiffs argued that there was pendent jurisdiction over their alleged common law fraud claims and that this would justify the inclusion of foreign purchasers in the proposed class. *Id.* at 993. The Second Circuit rejected this argument, calling it "ludicrous" to consider the state law claims of foreign purchasers pendent, and finding it would be an abuse of discretion for the district court to exercise pendent jurisdiction over the foreign purchasers' common law fraud claims. *Id.* at 996 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726–27 (1960)). The Court also articulated practical concerns, such as the introduction of complex choice-of-law issues, and the resultant necessity to look at the laws of at least fourteen other countries where sales were made, and the minimal domestic impact of a substantially foreign transaction, which together also weighed heavily against the exercise of pendent jurisdiction.

While not necessary to its finding of lack of jurisdiction, the Court noted that the management of a class including thousands of foreign purchasers could impose burdens on overtaxed district courts. In addition, and of critical importance to defendants' argument here, Judge Friendly also considered the likelihood of foreign recognition of any U.S. judgment that might be ultimately entered in the action: "Also, while an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a *near certainty*," because, as Judge

Frankel had observed in his district court decision certifying a class, "if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been." *Id.* (emphasis added).[11] In light of "uncontradicted affidavits that England, the Federal Republic of Germany, Switzerland, Italy, and France would not recognize a United States judgment in favor of the defendants as a bar to an action by its their own citizens" and an affidavit stating that several hundred individually brought claims were pending in Switzerland and that at least ninety had been settled, the Second Circuit directed the district court to exclude from the class action all foreign purchasers over whose claims—importantly—there was neither federal nor pendent jurisdiction. *Id.* at 996–97.

(b) The Progeny of Bersch

Since *Bersch*, and without the benefit of any further guidance from the Second Circuit, courts in this district and elsewhere have considered, in a somewhat haphazard way, the risk of nonrecognition by a foreign court as a factor relevant to whether, for purposes of satisfying Rule 23(b)(3), class treatment of foreign purchasers' claims is a superior method of adjudication.

Defendants point to three post-*Bersch* cases to support the exclusion of foreign purchasers from the proposed class here. In *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 459 (S.D.N.Y. 1989), Judge Mukasey denied class certification in a securities fraud action because the combination of (1) an uncontested affidavit stating that a British court "will not" recognize a foreign judgment in a U.S. opt-out class action, (2) a class size of only twenty-five members, and (3) atypical claims by the named plaintiff

[11] Judge Frankel's decision of June 28, 1972 was not reported, but it appears that despite his concern about claim preclusion he certified a class of all purchasers, foreign and domestic. *Id.* at 982.

together failed to satisfy the requirements of Rule 23. "[T]he combination of these problems," Judge Mukasey noted, "no one of which standing alone would necessarily require denial of class certification, virtually mandates the rejection of the class action form here." *Id.* at 460. While it is not clear what standard Judge Mukasey applied with respect to the claim preclusion issue, it would appear that he considered an uncontested affidavit stating to a certainty that a British court would not recognize a U.S. judgment insufficient on its own to deny class certification. Similarly in *Ansari v. New York University*, 179 F.R.D. 112 (S.D.N.Y. 1998), Judge Mukasey found that doubts regarding claim preclusion in foreign jurisdictions tipped the scales against an already weak motion for class certification. In *Ansari*, a dentist sued New York University, its college of dentistry, and various university officials, alleging breach of contract and violation of state statutes relating to an alleged failure to provide education services. The proposed plaintiff class included only thirty-five members, some of whom were foreigners, and failed to satisfy Rule 23(a)(1)'s numerosity requirement. *Id.* at 116. Second, though "not as significant as the failure to satisfy the numerosity requirement," class certification was denied because "limited case law . . . suggests" that at least six of the relevant foreign countries would not accord claim preclusion to an opt-out class action. *Id.* at 117. Judge Mukasey considered this fact "further evidence that class certification is inappropriate," though of course the decision could have rested entirely on plaintiffs' failure to establish numerosity. *Id.*

In *In re Daimler Chrysler AG Securities Litigation*, 216 F.R.D. 291 (D. Del. 2003), on which defendants also rely, plaintiffs asserted securities fraud claims against a German automobile manufacture based on false statements allegedly made in connection with the acquisition of an American automobile manufacturer. The court did not cite *Bersch* but did cite *Ansari* and *CL-Alexanders* for the proposition that class certification may be inappropriate where "obstacles"

exist due to the inclusion of foreign class members. *Id.* at 301. Finding "practical difficulties" in maintaining a class with foreign investors, and further that plaintiffs had not adequately addressed manageability and damage issues, the court limited the class to U.S. investors.

Reaching a different result in *Cromer Finance Limited v. Berger*, 205 F.R.D. 113 (S.D.N.Y. 2001), Judge Cote considered the res judicata effect of a class action judgment as "a factor that must be considered in evaluating the superiority of the class action device," but distinguished those cases "in which there is a 'possibility' that a foreign court may not recognize a judgment, and those in which there is 'near certainty' that it will not be recognized." *Id.* at 134–35 (citing *Bersch*, 519 F.2d at 996). Judge Cote concluded, upon review of the competing expert affidavits, that it was "at most a 'possibility'" that foreign courts would not recognize a U.S. judgment, and certified a class including foreign claimants alleging federal securities fraud against an operator of an offshore investment fund and Bermuda accounting firms. *Id.* at 135. Taking a different tack, Judge Sweet, in *In re Lloyd's American Trust Fund Litigation*, No. 96 Civ. 1262 (RWS), 1998 WL 50211, at *15 (S.D.N.Y. Feb. 6, 1998), read *Bersch* as applying only to whether a class action should proceed under principles of pendent jurisdiction, and emphasized that *Bersch* did not directly address the issue of superiority under 23(b)(3). Without applying the "near certainty" test, Judge Sweet concluded that "a foreign court may look to the results achieved here for guidance, thereby contributing to the superiority of the class action procedure," and certified the class. *Id.*; *see also In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 50 (S.D. Cal. 1975) (stating that defendant's "reliance upon *Bersch* is misplaced because *Bersch* does not preclude foreign nationals from membership in any class alleging violations of the federal securities acts simply because of res judicata problems" and noting that "[a]lthough the res judicata problem is one factor to consider . . . it should not be used to deny [class

certification] . . . especially when this Court otherwise has subject matter jurisdiction").

In *Frietsch v. Refco, Inc.*, 92 C. 6844, 1994 WL 10014 (N.D. Ill. Jan. 13, 1994), the district court for the Northern District of Illinois considered a motion to certify a class of investors in commodity pools, including a number of German putative class members. The plaintiffs alleged, *inter alia*, violations of Sections 10(b) and 12(2) of the Exchange Act. *Id.* at *1. There, as here, the defendants argued that the class action device failed under Rule 23(b)(3) because German law would not recognize a judgment in a U.S. class action. *Id.* at *11. In support of this argument, the defendants' German law expert stated that a judgment in defendants' favor would "'most likely' not be given res judicata effect." *Id.* By contrast, the plaintiffs' German law expert stated that the "issue of res judicata cannot be predicted with certainty because there are no precedents, and any decision by a German court would be fact specific." *Id.* Faced with dueling affidavits, the court concluded that the preclusion issue "remain[ed] an uncertainty that [would] not paralyze the court from making a ruling that will provide all parties with the most efficient tools available to litigate the claims in this case." *Id.* The *Freitsch* court distinguished *CL-Alexanders* and *Bersch*, because in those cases the record contained uncontradicted affidavits that persuaded the respective courts that foreign courts would certainly not afford res judicata effect to a U.S. judgment on behalf of a class. *Id.*

The foregoing cases, regardless of their ultimate outcome, reveal that res judicata concerns have been appropriately grafted onto the superiority inquiry. It does not appear, however, that res judicata concerns should be dispositive without either an evaluation of the likelihood of nonrecognition or a consideration of other factors which impact a determination of the superiority requirement. *Ansari*, 179 F.R.D. at 116 (res judicata is "one of the factors that must be considered."); *Cromer*, 205 F.R.D. at 134; *In re*

U.S. Fin. Sec. Litig., 69 F.R.D. at 49 ("[T]he issue of *res judicata* was *one* of several factors to be considered." (citing *Bersch*, 519 F.2d 974)). With regard to an evaluation of the risk of nonrecognition, the Court does not find the "near certainty" standard to be a particularly useful analytical tool. In *Bersch*, Judge Friendly found, based on unopposed affidavits that nonrecognition was almost certain; however, there is no indication that only this degree of certitude calls into question the superiority of a class action. Nor is it likely that only where nonrecognition is a "mere possibility" ought a court find superiority to be established. It seems more appropriate, instead, to evaluate the risk of nonrecognition along a continuum. Where plaintiffs are able to establish a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement. *See In re IPO Sec. Litig.*, 471 F.3d at 33 (placing burden on plaintiff not just to produce "some evidence" of compliance with Rule 23, but to show that its requirements are met). Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class. The closer the likelihood of non-recognition is to being a "near certainty," the more appropriate it is for the Court to deny certification of foreign claimants. With these principles in mind, the Court now turns to the parties' arguments with respect to the degree of risk of foreign nonrecognition in this case.

(c) Recognition in France

Both sides have submitted voluminous competing expert declarations on the question of whether foreign courts would grant preclusive effect to a United States judgment or

settlement in this action.[12] Because a vast majority of the foreign shareholders are French nationals, the Court will address first, and in greater detail, the likelihood of recognition by a French court.

As both parties agree, there is no bilateral (or multilateral) agreement between France and the United States governing the recognition and enforcement of judgments and jurisdictional decisions rendered by their respective courts. (*See* Mourre Decl. ¶ 19; Renard-Payen Decl. ¶ 12; Audit

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[12] The following citation conventions will be followed with respect to the parties' competing expert declarations. Declaration of Bernart Audit in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 27, 2005 ("Audit Decl."); Declaration of Guy Carcassonne in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 23, 2005 ("Carcassone Decl."); Declaration of Daniel Cohen in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Oct. 3, 2005 ("Cohen Decl."); Declaration of Gérard de Geouffre de la Pradelle in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 29, 2005 ("de la Pradelle Decl."); Declaration of Olivier Renard-Payen in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 27, 2005 ("Renard-Payen Decl."); Declaration of François Terré in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 30, 2005 ("Terré Decl."); Joint Declaration of Daniel Cohen and Géraud de Geouffre de la Pradelle in Support of Vivendi Universal, S.A's Sur-Reply in Opposition to Plaintiffs' Substituted Motion for Class Certification, Feb. 3, 2006 ("Cohen/de la Pradelle Decl."); Declaration of Alexis Mourre in Support of Plaintiffs' Motion for Class Certification, Dec. 6, 2005 ("Mourre Decl."); Declaration of Hélène Gaudemet-Tallon in Support of Plaintiffs' Motion for Class Certification, Dec. 1, 2005 ("Gaudemet-Tallon Decl."); Declaration of Hans Smit in Support of Plaintiffs' Motion for Class Certification, Dec. 20, 2005 ("Smit Decl."); Supplemental Declaration of Alexis Mourre in Support of Plaintiffs' Motion for Class Certification, June 22, 2006 ("Mourre Suppl. Decl."); Joint Declaration of Bernard Audit, Guy Carcassonne, Daniel Cohen, Gérard de Geouffre de la Pradelle, and Olivier Renard-Payen Setting Forth Observations with Respect to the Supplemental Declaration of Alexis Mourre and the Decision of the *Cour de Cassation* in *Prieur v. De Montenach*, July 7, 2006 ("Defs.' Suppl. Decl.").

Decl. ¶ 13; de la Pradelle Decl. ¶ 15.) French law also does not follow the condition of reciprocity, whereby a foreign judgment may have effect in France only if the foreign jurisdiction gives effect to French decisions. (*See* Terré Decl. ¶ 14.) Thus the United States's rules for recognition of foreign judgments are not relevant, and French recognition of a United States judgment is determined with reference solely to French law. The issue of whether a United States class action judgment would be recognized and enforced in France has never been directly addressed by French courts. (*See* Mourre Decl. ¶ 17; de la Pradelle Decl. ¶ 35; Gaudemet-Tallon Decl. ¶ 26; Smit Decl. ¶ 91.) However, French decisional law does address in general terms the circumstances in which foreign judgments may be recognized. (*See* de la Pradelle Decl. ¶ 15.)

Under French case law, before a foreign decision may be enforced or recognized (i.e., given preclusive effect) in France, it must first be subjected to the "exequatur" procedure. (Terré Decl. ¶ 15; de la Pradelle Decl. ¶ 30; Mourre ¶ 154.) Exequatur proceedings are concerned with the enforceability of a foreign decision under French law, and not with the substance of the underlying dispute. (Terré Decl. ¶ 16; Smit Decl. ¶ 56.) If exequatur is granted, the underlying judgment is not changed, but rather its content is incorporated into the exequatur judgment, which then receives enforceability and res judicata effect in France. (Terré Decl. ¶ 16; Mourre Decl. ¶¶ 154–56.) The competing expert declarations agree that the recognition and enforcement of foreign judgments (grant of exequatur) in France is primarily governed by the *Munzer* case, decided by France's highest court, the *Cour de cassation*, in 1964. (*See, e.g.*, Audit Decl. ¶¶ 14, 16; Mourre Decl. ¶ 20; de la Pradelle Decl. ¶ 17; Terré Decl. ¶ 19; Renard-Payen Decl. ¶ 13.) The conditions that must be met under *Munzer* in order to grant exequatur may be summarized as follows: (1) the foreign court must properly have jurisdiction under French law (the "jurisdictional prong"); (2) the foreign court must have

applied the appropriate law under French conflict-of-law principles (the "applicable-law prong"); (3) the decision must not contravene French concepts of international public policy (the "public policy prong"); and (4) the decision must not be a result of *fraude á la loi* (evasion of the law) or forum shopping (the "forum shopping prong"). (*See* Cohen/de la Pradelle Decl. ¶ 5.)

(i) Jurisdictional Prong

Whether this Court would be viewed as having properly asserted jurisdiction over the French defendants is governed by the *Cour de cassation* case of *Simitch v. Fairhurst* (Cass. 1e civ. Feb. 6, 1985) (*see* Defs.' Suppl. Decl. ¶ 3; Mourre Decl. ¶ 22; Smit Decl. ¶ 58). The *Simitch* test requires that, in order for a foreign court to have properly exercised its jurisdiction, the following requirements must be met: (1) the case must not fall within the exclusive jurisdiction of the French courts, (2) the circumstances of the case or judgment at issue must be linked in a "characterized manner" to the foreign court, and (3) the choice of the foreign court must not be fraudulent. (*See* Mourre Decl. ¶ 24; *see also* Defs.' Suppl. Decl. ¶ 3.) Defendants' initial submissions relied heavily on the proposition that French courts had exclusive jurisdiction over French defendants under Article 15 of the French Civil Code and that, absent waiver, French courts would never recognize a U.S. judgment entered against a French entity. That position is no longer tenable in light of the recent decision of the *Cour de cassation* in *Prieur v. Montenach* (Cass. 1e civ. May 23, 2006) holding that "Article 15 only provides for an optional jurisdiction of French courts."

The question then becomes whether there is a sufficient or "characterized link" to warrant the exercise of jurisdiction by a U.S. court. Plaintiffs' experts contend that in order to satisfy this requirement, a French court does not need to determine that the foreign court has jurisdiction according to French conflict-of-jurisdictions rules, but rather must find

that there were sufficient connections between the case and the foreign court such that its exercise of jurisdiction was not inappropriate. (Mourre Decl. ¶ 76.) Although there are no precise criteria to define what might constitute a "characterized link" (*id.* at ¶ 75), one of plaintiffs' experts, Professor Hans Smit, likens it to the American concept of subject matter jurisdiction. (Smit Decl. ¶ 58). This Court, of course, has determined that subject matter jurisdiction exists based on plaintiffs' allegations that a substantial number of Vivendi's securities were traded in the United States, that individual defendants allegedly moved to the United States to expand Vivendi's presence there, and that a number of the alleged fraudulent acts took place in the United States. (*See* Mourre Decl. ¶ 77.) Based on the foregoing, plaintiffs' experts conclude that the "characterized link" requirement is "easily met in this case" (*id.* at ¶ 78), and indeed, that "there can be no doubt" of that fact (Smit Decl. ¶ 58).

Defendants' experts, however, express no such sanguine view of the likelihood of the "characterized link" test being met. They are instead "firmly of the view that a French court would reject a U.S. Court's assertion of jurisdiction over those foreign/absent class members as improper." (Defs.' Suppl. Decl. ¶ 5.) Defendants' experts base this conclusion in large part on the circumstances underlying the *Cour de cassation*'s recognition of foreign jurisdiction in the above-mentioned *Prieur* case. There, the French court found that the exercise of jurisdiction by the Swiss courts was appropriate in an annulment proceeding where the husband and wife were both born in Switzerland, married in Switzerland under Swiss law, and established their marital residence in Switzerland. Although the husband was a French citizen, these "ties" to Switzerland, the French court concluded, justified referring the case to Swiss courts to rule on the annulment of the marriage. (*See* Mourre Suppl. Decl. Ex. A, at 3.) Defendants' experts contend that the *Prieur* case shows a French court will require a similar showing of substantial contacts between the parties and the foreign

jurisdiction before recognizing a "characterized link." (Defs.' Suppl. Decl. ¶¶ 8–9.) Unlike the parties in the *Prieur* case, the foreign shareholders in the putative class had no direct contacts with the United States, and did not purchase their Vivendi shares in the United States. (*Id.* at ¶ 10.) In addition, the foreign shareholders have not expressly indicated any desire to sue Vivendi—a French corporation with its headquarters in Paris—in the United States or to be included in the putative class here. (*Id.*)

The acknowledged difference in degree of the contacts between the parties and the foreign forum in *Prieur* and in the instant case, however, is not sufficient to persuade this Court that a French court would not find a sufficient characterized link between the alleged fraud in this action and the United States sufficient to support the Court's exercise of jurisdiction. Defendants' experts merely show that where the ties of a case to the foreign jurisdiction are so significant as to be considered near absolute, a characterized link is readily established. It does not follow that the connection between defendants' alleged fraudulent course of conduct, occurring in sufficient part in the United States to warrant a finding of subject matter jurisdiction under our laws, would be insufficient under the "characterized link" standard. The links between the parties and the foreign forum in *Prieur* tend more to establish the paradigmatic case than to illuminate what a French court would decide when faced with the potentially closer question presented here. Upon the record presented, where Vivendi's CEO and CFO moved their operations to the United States and, allegedly, continued their fraudulent scheme there, the Court concludes that a French court would likely find a "characterized link" sufficient to satisfy the second element of the *Simititch* test.

The final element of the *Simititch* test is that plaintiffs' choice of a United States court must not have been fraudulent. This requirement has two different elements. First, the foreign judgment must not have been "obtained

through deceitful maneuvers." (Mourre Decl. ¶ 79.) Defendants do not contest this element. Second, the case must not have been brought "in a foreign court in order to obtain a ruling from that foreign court, under foreign law that differs from the law to which a litigant would otherwise be subjected domestically." (Terré Decl. ¶ 45.) That is, plaintiff must not have manufactured jurisdiction in order to choose a more favorable forum when French law should have applied. Defendants argue that plaintiffs' U.S. action is "engineered" to evade a judgment under French law. In 2002, the "ADAM" association (protecting minority shareholders) along with certain Vivendi shareholders (designated by name) petitioned the Paris Commercial Court to investigate Vivendi during the basic class period. The court found the claim "ill-founded" and dismissed it. The ADAM chairwoman allegedly stated that the dismissal prompted her to introduce a class action in the United States on behalf of French shareholders. Thus, defendants argue, the U.S. action is an attempt to avoid the proper application of French law, and will preclude a grant of exequatur. (Terré Decl. ¶ 46; *see also* Cohen/de la Pradelle Decl. ¶ 21.)

As an initial matter, there is no evidence that the action pending before the Court was in fact brought at the instigation of the ADAM chairwoman. Furthermore, while plaintiffs in this case have clearly come before this Court in order to avail themselves of causes of action and procedural devices unavailable in France, it is by no means a certainty that this alleged forum shopping would form a bar to recognition. Indeed, it is difficult to see how plaintiffs in this case are operating a fraud on the court by bringing U.S. securities law claims that are, in part, based on activities in the United States, and which have been found to be within the Court's subject matter jurisdiction. The Court concludes, therefore, that a French court is unlikely to find that plaintiffs engaged in improper forum shopping in pursuing this action in the United States, and would conclude that the third

element of the *Simititch* test (and thereby the jurisdictional prong of *Munzer*) is satisfied.

(ii) Applicable-Law Prong

The applicable-law prong asks whether under French choice-of-law principles the application of U.S. law in this action is appropriate. Although French law recognizes that when a French company trades securities on foreign exchanges it is subject to the laws of those countries (*see* Mourre Decl. ¶ 139), the issue here is whether U.S. law was properly applied with respect to non-U.S. investors who did not purchase Vivendi securities on the NYSE. Neither party provides guidance on what recognized French choice-of-law principles in fact are, nor what rules of analysis are applied in determining whether, in the French view, the proper law has been applied.

Defendants' expert opinions are not uniform with respect to their analysis of the applicable-law prong. Two of defendants' experts believe that a French court would determine that the appropriate applicable law would be French law, because the defendants are French, much of the alleged wrongdoing occurred in France, and many of the relevant transactions were made by French investors in France. (*See* Terré Decl. ¶ 28; Audit Decl. ¶ 25.) However, Terré and Audit both acknowledge that the application of foreign law may be recognized as appropriate where the doctrine of "equivalence" applies. (*See* Terré Decl. ¶ 29; Audit Decl. ¶ 26.) Equivalence exists where the resolution of the matter under French law would have been the same as the one made under the foreign law at issue. (*See* Terré Decl. ¶ 29.) Both Terré and Audit argue that the application of U.S. law and French law in these circumstances would not be considered equivalent because of fundamental procedural differences, such as the opt-out mechanism and the

calculation of damages contemplated by Rule 23.[13] (*See* Terré Decl. ¶¶ 30–31; Audit Decl. ¶ 26.)

Defendants' experts Cohen and de la Pradelle take a slightly different view, though arriving at the same conclusion that a French court would not consider the applicable-law prong satisfied. Under French law, a company whose office is in French territory is subject to French law.[14] (*See* Cohen Decl. ¶ 18.) Cohen and de la Pradelle conclude that based on the foregoing provisions of French law, any judgment applying U.S. law to a case involving a French company would not be recognized. (*See* Cohen/de la Pradelle Decl. ¶ 15; *see also* Cohen Decl. ¶ 18.) These provisions standing alone, however, do not provide any basis for concluding that a company whose registered office is located on French territory may not, under certain circumstances, be subject to the laws of any other jurisdiction. In addition to these provisions of French law, Cohen and de la Pradelle rely on a 1997 decision by the *Cour de cassation*, *Société Africatours* (Cass. 1e civ. July 1, 1997). (*See* Cohen Decl. ¶ 20, Ex. 6.) A translation of the case was not provided but the entire summary provided by Cohen reads as follows:

> In [*Société Africatours*], the *Cour de cassation* set aside the decision of the Court of Appeal which had declared Senegalese law applicable to a company with its registered office in Senegal but had interpreted it from the point of view of French law which it had believed was similar: in doing so,

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[13] Notwithstanding the procedural differences, Terré concedes that substantively the claims in this action and in suits by two shareholders pending actions in France are undeniably similar. (Terré Decl. ¶ 31; see also Cohen Decl. ¶ 24 regarding similarity of causes of action alleged under French law.)

[14] "According to Article 1837 of the French Civil Code and Article L. 210-3 of the French Commercial Code 'companies whose registered office is located on French territory shall be subject to French law.'" (Cohen/de la Pradelle Decl. ¶ 15; Cohen Decl. Ex. 5.)

> it had falsely applied ordinarily applicable law and had misinterpreted it.

(Cohen Decl. ¶ 20.) Although Cohen and de la Pradelle assert that this case "specifically [rules] that if a company's registered office is located in France, then any legal action against that company brought by shareholders must be conducted according to French law" (Cohen/de la Pradelle Decl. ¶ 16), without more the conclusion simply does not follow from the described reasoning of the *Cour de cassation*.

As with the jurisdictional prong, plaintiffs' experts believe the applicable-law prong is easily met in this case: "[T]he requirement that the foreign court must have applied the law that governs according to French choice of law rule[s] is flexible and . . . it is sufficient if the law applied is substantively equivalent under French choice of law principles. That requirement appears amply met." (Smit Decl. ¶ 87.) More specifically, plaintiffs' expert Mourre argues first that the dominant view among French scholars is that the applicable-law prong should not be applied, and states that in fact the requirement is frequently not applied by courts. (Mourre Decl. ¶ 142.) Under this "dominant view" the proper inquiry asks only whether the foreign judge "seized" jurisdiction with the intent of avoiding the application of French law, or if the application of foreign law would constitute a violation of public policy. (*Id.*) Alternatively, Moure contends that the applicable-law may be met under the doctrine of equivalence, which accepts the application of a law other than that designated by French choice-of-law rules where the application of that foreign law leads to a result equivalent to the result that would have been reached under French law. (*Id.* at ¶ 146.) Considering the elements of plaintiffs' Section 10(b) claim, together with the fact that no punitive or other special or exemplary damages may be awarded in this action, Mourre concludes that the result in this action would be equivalent to that reached under

Article L. 465-2 of the *Code monétaire et financier*.[15] (*Id.* at ¶ 148.) This conclusion is supported indirectly by defendants' expert, Professor Cohen, who details at great length the substantive similarities of U.S. and French laws prohibiting the dissemination of false and misleading information to shareholders. (Cohen Decl. ¶¶ 27–43). Defendants' expert Audit opines that procedural differences between French and U.S. shareholder litigation code preclude a finding of equivalence, but he provides no basis for his views. (Audit Dec., ¶ 26). On balance, the Court concludes (a) that procedural differences are more properly the subject of a public policy analysis and (b) that the substantive similarities between U.S. and French law regarding securities fraud are likely sufficient under the doctrine of equivalence to meet the applicable-law prong of the *Munzer* test.

(iii) Public Policy Prong

This prong of the *Munzer* test requires that the foreign judgment to be recognized must be in "conformity with international public policy." (Audit Decl. Ex. 5.) This requirement is perhaps the most problematic of all the *Munzer* conditions inasmuch as French law does not recognize opt-out class actions. (Cohen Decl. ¶ 49–51; Mourre Decl. ¶¶ 102–05). The fact that opt-out class actions are not presently permitted is, of course, some indication that such actions are contrary to French public policy. However, the fact that a particular right is not recognized in France will only lead to nonrecognition of a foreign judgment where the judgment would "infringe principles of universal justice." *Lautour v. Guiraud* (Cass. 1e civ. May 25, 1948) (Mourre

[15] This provision "provides for the liability of any individual or entity who 'disseminates in the public, by any means, false or misleading information on the perspectives of evolution or on the situation of an issuer of securities whose securities are traded on a regulated stock exchange or on the perspectives of evolution of a financial instrument traded on a regulated market, in a manner that can influence the market value.'" (Mourre Decl. ¶ 148.)

Decl, Annex 27) ("[F]oreign rules . . . are not contrary to the French conception of international public policy merely because they differ from mandatory provisions of French law, but only insofar as they infringe principles of universal justice considered in French conception as having universal value.").)

Defendants contend that an opt-out class action offends such universal principles in three respects. First, it is an accepted principle of French law that no one may claim in court by proxy. This principle—in French, *nul ne plaide par procureur*—procedurally requires anyone acting as a plaintiff or defendant in a lawsuit to make his identity known individually in the legal proceedings. (*See* Terré Decl. ¶ 38.) As a result, defendants' argue, the fact that not all members of the putative class will be identified by name, but instead represented by court-appointed class representatives, will be fatal to recognition of a U.S. judgment in this case by a French court. (*See id.* at ¶ 39; Renard-Payen Decl. ¶ 15; de la Pradelle Decl. ¶¶ 40–43; Cohen/de la Pradelle ¶¶ 19–20.) Defendants further argue that the failure to identify each plaintiff individually contravenes French notions of due process. (Audit Decl. ¶ 30.) This is because of a "strong principle" of French law that no one should be a plaintiff without consenting affirmatively to do so. (Audit Decl. ¶ 31). Members of an opt-out class, of course, are not required to take any steps to be included in this class. Defendants also argue that the opt-out class is inconsistent with the fundamental principle of adversarial proceedings, *le principe du contradictoire*, which gives every litigant the "personal freedom" to appear and be heard during any proceeding affecting his rights. (Cohen/de la Pradelle Decl. ¶ 20; Audit Decl. ¶ 32) Particularly where individual notice is not required (as is permissible under Rule 23), a class member could be deprived of his fundamental right to appear without ever having received actual notice. (Cohen/de la Pradelle Decl. ¶ 20.) Finally, contingency fees are prohibited under French law because such fees reduce the amount of

compensation available to plaintiffs, and, therefore, a U.S. judgment which provided contingent fees "could likely be regarded" as a violation of French public policy. (Audit Decl. ¶ 34.)

Plaintiffs' experts reject the notion that U.S.-style class actions are incompatible with fundamental principles of justice as interpreted by the French courts. (Smit Decl. ¶¶ 85–90; Mourre Decl. ¶¶ 97–105.) Thus, Mourre points out that group actions may be instituted by trade unions on behalf of employees without individual consent, and that associations of copyright holders are permitted to act in court on behalf of the members of their group. (Mourre ¶¶ 99–101.) Furthermore, as one of defendants' own experts points out, shareholder associations have the right to sue companies and their directors, and to solicit a mandate from individual shareholders (using mail and public notice) to act on their behalf. (Cohen Decl. ¶¶ 45–48.) Though these procedures are surely distinguishable from a Rule 23(b)(3) opt-out class, they do not evince a fundamental hostility to the concept of collective actions.

Plaintiffs' experts further argue that defendants misinterpret and misapply the principle of *nul ne plaide par procureur*. In Mourre's view, the principle of *nul ne plaide par procureur* stands for the proposition that a party to a court proceeding cannot appear as acting in its own interest when in reality it exercises the rights of a third party whose identity is concealed. The purpose is to avoid procedural fraud so that a defendant knows about specific defenses. (Mourre Decl. ¶ 131; *see also* Smit Decl. ¶ 74 (opining that the rule is the French equivalent of the real party-in-interest requirement of Rule 17).) In this case, defendants know the plaintiffs represent the absent class members, who are the real parties bound together by Rule 23's requirement of commonality and typicality. (*See* Smit Decl. ¶ 74, Mourre Decl. ¶ 132.) Moreover, Mourre points to case law confirming that *nul ne plaide par procureur* is not part of the

French conception of international public policy and is not a basis to set aside a foreign judgment. (Mourre Decl. ¶¶ 133–34 (citing *Chenue v. Brachat* (Paris 5e. B, Oct. 24, 1991); Colmar, *Kruger v. Fougerolle* (Apr. 30, 1996); *Mandel v. Coprim* (Paris 1e. C, Oct. 27, 1998)).

Plaintiffs' experts acknowledge that French citizens have the right as "personal freedom" to appear and be heard in any action but contend, simply, that Rule 23(b)(3) honors such rights by providing every class members the opportunity to opt-out of the class. (Smit. Decl. ¶ 88; Mourre Decl. ¶¶ 109–10. Mourre also notes that collective actions by trade unions have been permitted by French courts on the equivalent of an opt-out basis, provided that member-employees are given notice of the action. (Mourre Decl. ¶ 99.) Thus it may well be that the French courts would enforce a U.S. class action judgment against a class member who received actual notice and, therefore, had a meaningful opportunity to exercise his "personal freedom," but decline to enforce the judgment against a class member who can show that he did not receive actual notice.

Weighing both parties detailed affidavits, the Court concludes that an opt-out class judgment would not offend French concepts of international public policy. While it is clear that such class actions are presently not permitted, it is equally clear that the ground is shifting quickly. Defendants' own expert, Professor Cohen, noted this development:

> French law does not cease to evolve in a direction favorable to *class actions*. Following the practice of the United States, the President of the French Republic seriously wished to develop collective actions and put in place a commission of study on April 13, 2005 responsible for the introduction of a sort of "class action" for relationships with consumers.

> Quite naturally the issue of the introduction into French law of "*securities class actions*" was raised in order to more effectively protect shareholders and investors. . . . The least that one can say is that this tendency is strongly gaining ground and that the evolution of French law seems very rapid. While not long ago one considered that they seemed far from French law, works are multiplying today to attempt to take the exact measure and to acclimate them in France. . . . French law is thus oriented toward "class actions" in matters of protection of shareholders and investors.

(Cohen Decl. ¶¶ 49–50.) Defendants are quick to point out that the study referred to by Professor Cohen observed that most of the study group's members viewed on opt-out class to be contrary to French law. (Cohen/de la Pradelle Decl. Ex. D at 32). On the other hand, a number of the members of the study recommended legislation establishing an opt-out class mechanism based on the U.S. and Quebecois models. (*See, e.g.*, *id.* Ex. D, Working Group Report, Comment by Jean-Guy Lévy, President of the Bar.) Of course, whether or when France adopts class action legislation and whether it includes an opt-out mechanism cannot be foretold. However, the expressed views of the French President, as well as the ongoing debate in legal and business sectors is strong evidence that the class action model is not so contrary to French public policy that its use would likely be deemed an infringement of "principles of universal justice" or contrary to "international public policy." Accordingly, the public policy prong of the *Munzer* test is likely satisfied.

(iv) Absence of Fraud

The final prong of the *Munzer* test – that the action before the foreign court was not fraudulent – has been addressed in the course of the Court's consideration of the

Simitch decision. *See discussion supra*. For the reasons stated above, it appears unlikely that a French court would find fraud or improper forum shopping in plaintiffs' pursuit in this Court of claims arising under the U.S. securities laws.

* * *

In sum, the Court concludes that plaintiffs' experts have shown a probability that French courts will find that (i) this Court has properly asserted jurisdiction over claims that have a "characterized link" to this jurisdiction; (2) U.S. securities laws satisfy the doctrine of equivalence and are appropriately applied; (3) a judgment herein will not infringe principles of universal justice; and (4) plaintiffs have not engaged in prohibited forum shopping. Accordingly, a judgment in this case would, more likely than not, be granted recognition at such time as an exequatur proceeding is instituted.

(d) Recognition in England

There is no clear authority addressing the res judicata effect of a U.S. class action judgment in England. As there is no statute or convention at play, the issue is addressed under common law rules. English common law provides for enforcement of a foreign judgment where the foreign court was "competent."[16] English authorities consistently discuss the competency of a foreign court in terms of whether there was jurisdiction over the *defendant*. Thus, a court is competent when (i) the defendant was present within its jurisdiction when proceedings were instituted, or (ii) the defendant submitted to its jurisdiction. (Declaration of Laurence Rabinowitz in Support of Vivendi Universal, S.A's

[16] The other elements generally required to establish *res judicata* are (i) that the judgement be final, (ii) that there is an identity of parties and (iii) that there is an identity of subject matter. (Rabinowitz Decl. ¶ 34 (citing *Good Challenger v. Navegante SA v. Metalexportimport SA* [2003] EWCA Civ. 1668).) The defendants do not argue that these elements would not be met.

Opposition to Plaintiffs' Motion for Class Certification, Sep. 29, 2005 ("Rabinowitz Decl."), ¶ 25.) By this standard, of course, this Court would be competent as Vivendi's extensive U.S. operations place it within the Court's jurisdiction.

Defendants contend, however, that if presented with the issue, English courts would also require that a U.S. court have personal jurisdiction over non-U.S. class members through their individual appearance in the action (Rabinowitz Decl. ¶ 26.) Some support for this position can be found in dicta in *Campos v. Kentucky & Indiana Terminal Railroad Company* [1962] 2 Lloyd's Rep. 459 (QB). Therein the court ruled in favor of defendant on the merits of the case but went on to note that defendant's alternative defense of res judicata with regard to a favorable U.S. class action judgment would likely fail because (i) the U.S. action was a "spurious" class action,[17] which did not bind absent parties even under U.S. law and (ii) in any event, plaintiff was not a class member at the initiation of the U.S. proceeding. Lastly, the court found "great force" in the argument that res judicata would not operate in an English court against a party who has not been served with process in the foreign proceeding. This begs the question of whether a class member is a party. Thus, it is far from clear how the court's observation—accurate as far as it goes—would have been applied in the case of a "true" Rule 23(b)(3) class wherein absent class members are not parties for a variety of procedural purposes, including service of process. Conte & Newberg, *supra*, § 1.4 n.2. Defendants' expert simply ignores the issue and assumes, without analysis, that absent members are subject to the same English common law jurisdictional rules that, as noted, refer only to the need for service upon, or an appearance by, individual

[17] "[S]purious class action was little more than a permissive joinder device, which would be binding only on the original parties to the suit and those who might subsequently intervene." 1 Conte & Newberg, *supra*, § 1:9.

party defendants. While English courts are not bound thereby, the Supreme Court has explicitly rejected this reasoning, holding that non-resident class members need not appear individually, and that adequate notice with an opportunity to opt-out is sufficient to establish a limited consent to jurisdiction. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806-14 (1984). In addition, the inference that an English court would not find a U.S. court competent where non-resident class members had not personally been served, appears inconsistent with English law governing class or "representative" actions which, in fact, allows absent parties to be bound. Rule 19.6 of the 1998 Civil Procedure Rules provides as follows:

> (1) Where more than one person has the same interest in a claim –
> a. the claim may be begun; or
> b. the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.
> (2) The court may direct that a person may not act as a representative.
> (3) Any party may apply to the court for an order under paragraph (2).
> (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –
> a. Is binding on all persons represented in this claim; but
> b. may only be enforced by or against a person who is not a party to the claim with the permission of the court.

(Harris Decl. ¶ 44.) Thus, English representative actions will bind those on whose behalf a claim is brought (and, under section 4(b), persons who are not parties to the claim with the court's permission). *See generally* Neil Andrews, *Multi-Party*

Proceedings in England: Representative and Group Actions, 11 Duke J. Comp. & Int'l L. 249 (2001). There is no requirement, express or implied, that class members, foreign or domestic, must appear or be served in order to be bound. It is true that the scope of representative actions relating to claims for damages is considerably narrower in England than in the United States and that it is unlikely that the present action could proceed as a representative action in England. (Declaration of Jonathan Harris in Support of Plaintiffs' Motion for Class Certification, Dec. 8, 2005, ¶ 45.)[18] However, this appears to be more of a procedural distinction than a jurisdictional one, the point being that English law recognizes the competency of its own courts to bind absent parties in appropriate situations. While the issue is hardly free from doubt, based on the affidavits before it, the Court concludes that English courts, when ultimately presented with the issue, are more likely than not to find that U.S. courts are competent to adjudicate with finality the claims of absent class members and, therefore, would recognize a judgment or settlement in this action. (Harris Decl. ¶¶ 14–20 and 50–51 (citing John C. L. Dixon, *The* Res Judicata *Effect In England of a US Class Action Settlement*, 46 Int'l & Comp. L.Q. 134, 145–50 (1997)).)[19]

(e) Recognition in Germany

Whether a foreign judgment would be recognized in Germany is a matter of German procedural law. Plaintiffs' expert, Dr. Peter Mankowski, and defendants' expert, Dr. Gerhard Herman Otto Wegen, agree that there is no decision by a German court as to whether a judgment in a U.S. class

[18] But defendants' expert notes that "an English court might even entertain a class (or representative) action against Vivendi. Such a procedure is permitted by CPR Rule 19.6 . . ." (Rabinowitz Decl. ¶ 23.)

[19] As in France, English courts will not recognize foreign judgments that are contrary to "principles of natural justice." Dixon, supra, at 148. Significantly, Defendants' expert does not contest this point. (*See generally* Rabinowitz Decl.)

action would be recognized under the German Code of Civil Procedure (Zivilprozessordnung) ("ZPO"). (Declaration of Peter Mankowski in Support of Plaintiffs' Motion for Class Cerification, Dec. 12, 2005 ("Mankowski Decl."), ¶ 8; Declaration of Gerhard Hermann Otto Wegan in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sep. 27, 2005 ("Wegan Decl."), ¶¶ 7–8.) Section 328 of the ZPO provides for the recognition of foreign judgments if five conditions are met:

> (1) if the foreign court was competent for deciding on the claims based on the German provisions on jurisdiction, (2) if the defendant was properly served (in the legal relationships of the United States and Germany according to the Hague Service Convention) in a timely manner enabling defendant to defend itself properly, (3) if the judgment is not inconsistent with an earlier German or foreign judgment which would be itself recognised in Germany, (4) if the contents of the judgment do not infringe the German *ordre public*, i.e. the indispensable provisions of German law and (5) if reciprocity is guaranteed, i.e. if the foreign court would recognise a corresponding German judgment.

(Wegen Decl. ¶ 7.) Defendants' expert does not question the satisfaction of the first, second, third and fifth conditions.

Dr. Wegen contends, however, that a U.S. class action judgment would violate the "ordre public." (Wegen Decl. ¶ 7.) The constitutional premise for this position is found in Article 103 of the German Constitution which establishes the right of a citizen to be heard and to participate in legal proceedings. (Wegen Decl. ¶ 9; Mankowski Decl. ¶ 36.) This right, in the nature of a due process protection, is referred to as the right of "correct representation," (Wegen Decl. ¶ 10), or the "disposition maxim," (Mankowski Decl. ¶ 39).

Interestingly, Dr. Wegen appears to conclude that the right of correct representation could be satisfied, and a U.S. judgment would be enforced as to absent class members, provided they were to receive actual notice of the class action and had the opportunity to opt-out. (Wegen Decl. ¶ 12.) However, according to Dr. Wegen, service of notice must be made "in a manner that strictly complies with the requirements of the Hague Service Convention."[20] (Wegen Decl. ¶ 17.)

It is true that service of process in conformity with the Hague Service Convention would require individual service through the German Central Authority and local German courts. (Wegen Decl. ¶¶ 13–14.) But service of process in this context refers to the formal delivery of an initial pleading to an *opposing* party, i.e., the defendant. It cannot readily be thought of as a means of providing notice by plaintiff to a member of the plaintiff class. (Mankowski Decl. ¶¶ 49–54.) By analogy, in the U.S. context, it makes little sense to evaluate a class member's due process right to adequate notice in terms of whether the service requirements of Rule 4 of the Federal Rules of Civil Procedure have been satisfied.

Plaintiffs, then, appear to have the better of the argument that compliance with the due process requirements of the German constitution could be satisfied by measures reasonably calculated to give actual notice to class members of their right to opt-out of a U.S. class action and pursue, or decline to pursue, their individual claims. But even under Dr. Mankowski's analysis, it would seem that a U.S. judgment would not be enforced against a class member who did not in fact receive actual notice despite plaintiffs' efforts to broadly disseminate notice.

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[20] Under German law, German nationals can only be served by foreign claimants in conformity with the provisions of the Hague Service Convention.

There is a further concern regarding enforceability of a class action judgment that is not directly addressed by defendants' expert. Leaving aside the question of whether the Hague Service Convention is the exclusive means for notifying absent class members, can it be said that the use of a collective action is so contrary to German public policy that a U.S. class action judgment will not be recognized under any circumstance? In this regard the Court notes that, in contrast to France and England, collective actions remain unknown in Germany. Germany has recently passed the Investor Protection Model Procedure Act which addresses multiple suits by shareholders that allege violations of the capital market laws. (Mankowski Decl. ¶¶ 32–33.) This act provides for the use of test cases whose outcome would be binding in other individual shareholder actions. (*Id.*) However, it is not a collective action in the sense that non-party shareholders are bound by the results. By comparison, both France and England, albeit in limited circumstances, recognize collective actions in which the interests of non-parties are pursued and non-parties are bound by the results. *See discussion supra*. Taking the parties' expert affidavits as a whole, the Court is left with the distinct impression that the formalities of German law may well preclude the recognition of a judgment in the instant case. Indeed, plaintiffs' expert concludes only that "one cannot rule out a U.S. class action settlement or judgment . . . will be recognized or enforced in German." This candid opinion is insufficient on its face and leads the Court to conclude that plaintiffs have not shown a probability that German courts will give res judicata effect to a judgment in this case.

(f) Recognition in Austria

With respect to Austrian law, the parties' experts agree that under the current applicable law, there must be "formal reciprocity" between the foreign state and the Republic of Austria as a condition to recognition of a foreign judgment. (Declaration of Christian Herbst in Support of Vivendi

Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Oct. 1, 2005 ("Herbst Decl."), ¶ 34; Declaration of Leopold Specht in Support of Plaintiffs' Motion for Class Certification, May 12, 2005 ("Specht Decl."), ¶ 23.) Formal reciprocity may be established by a treaty to which the foreign state and the Republic of Austria are a party, or a duly published Austrian decree that states the existence of reciprocity. (Herbst Decl. ¶ 34; Specht Decl. ¶ 23.) The United States and Austria are not party to a reciprocity treaty, nor has an Austrian decree been published that would provided for the enforcement of a U.S. judgment. (Herbst Decl. ¶ 35.) Plaintiffs' expert, in response, provides only the opinions of various Austrian legal scholars that the Austrian law establishing these requirements is unconstitutional. (Specht Decl. ¶¶ 23–24.) These opinions fall far short of establishing a probability that an Austrian court would grant preclusive effect to any judgment or settlement issuing from this action.

(g) Recognition in The Netherlands

Plaintiffs have submitted the opinion of Professor Smit that Dutch courts would give binding effect to a judgment in, or settlement of a U.S. class action. As is true in other European jurisdictions, a shareholder class action does not appear to be available in the Netherlands. (Smit Decl. ¶ 46). Nevertheless, the Dutch Legislature has recently enacted class action legislation in other contexts indicating that recognition of a judgment in this case would not be contrary to fundamental principles of fairness in Dutch law (*Id.* ¶¶ 36–39.) Defendants have offered no evidence to dispute the Smit Declaration. Based on the record before it, the Court finds plaintiffs have shown a probability that Dutch courts would recognize a judgment or settlement in this action.

(h) The Risk of Nonrecognition Does Not Compel Exclusion of All Foreign Class Members

Having considered the arguments presented by both sides on the risk of nonrecognition of a U.S. judgment or settlement abroad, the Court concludes that such concerns, without more, do not warrant exclusion of the citizens of France, England, and the Netherlands, who are otherwise putative members of the proposed class. If and when the issue is presented to these countries, it is more likely than not that the courts in these countries would recognize the enforceability of a judgmer.. or settlement in the present case.

However, it is more likely than not that German and Austrian courts, at present, will not give res judicata effect to judgments or settlements in a U.S. opt-out class action. Because lawsuits could be brought by Austrian and German nationals against defendants alleging the same wrongdoing that underlies the allegations in this case, the Court concludes that the adjudication of German and Austrian shareholders' claims in this class action is not necessarily superior. The likelihood of nonrecognition in Germany and Austria raise weightier issues of fairness and lessen, albeit in limited realistic situations, the promise of economy, consistency, and finality made possible when class members are bound to a final judgment or settlement. *See* Fed. R. Civ. P. 23(b)(3)(C); *see also* 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1780 (3d ed. 2005) (noting that Rule 23(b)(3)(C) requires, *inter alia*, a court to "evaluate whether allowing a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results"); Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 130 (2003) ("[The American class action] serves the interests of economy by not having to try the same issues again and again in separate cases. It also serves the interests of consistency and finality by avoiding the possibility of inconsistent outcomes in separate trials of similar cases and resolving all claims in a single case that is binding on all class members.").

A countervailing concern, however, is that in a global economy, companies do business across international borders and sell their securities worldwide, and acts of corporate misconduct—whether committed in the United States, abroad, or both—may have substantial effects on the United States market. Where, as here, the Court has determined that significant alleged conduct occurred in the United States warranting application of the federal securities laws to foreign actors, *see In re Vivendi*, 381 F. Supp. 2d at 169, the United States has a strong interest in the enforcement of those laws where applicable. *Cf. Dirienzo v. Philip Servs. Corp.*, 294 F.3d 21, 32 (2d Cir. 2002) (rejecting defendant's *forum non conveniens* arguments in part because of United States' interest in enforcing its securities laws, and also noting that "[f]or securities markets to function efficiently, securities fraud law must be clear and enforceable"); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull, S.A.*, 606 F.2d 5, 9 (2d Cir. 1979) ("Congress did not intend 'to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when they are peddled only to foreigners.'" (quoting *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975))); Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563, 1569 (2005) (arguing in favor of "default presumption in favor of including foreign claimants in small claim securities, class actions law suits," because to do otherwise would lessen the deterrent effect of class adjudication).

Furthermore, in considering whether the threat of nonrecognition defeats the superiority of the proposed class, the Court should not ignore practical realities that reduce the risk that defendants would in fact be prejudiced by any potential nonrecognition in the form of duplication of effort

or inconsistent results. *See Cromer*, 205 F.R.D. at 135 n.32;[21] *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. at 48 (noting "that practical difficulties in each country make lawsuits by these [foreign plaintiffs] virtually impossible"); *see also* Buschkin, *supra*, at 1597. In this sense, defendants' res judicata concerns are "more hypothetical than real," since the likelihood of relitigation by absent class members in a European forum is low. (Pls.' Reply Mem. 11.) As plaintiffs' expert points out, absent class members who were dissatisfied with an adverse judgment, would be pressing claims (1) already adjudicated against them, (2) without the benefit of contingency fee arrangements, (3) with the added risks of having to pay defendants' counsel fees and costs of litigation. Further, such plaintiffs would be facing the risk that defendants would be able to successfully invoke this Court's jurisdiction to prevent recovery. (*See* Smit Decl. ¶ 105) Similar disincentives would apply to absent class members dissatisfied with a favorable judgment they deemed inadequate. (*Id.*) And in the case of a settlement, the Court

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[21] The contingencies that would have to be met before genuine res judicata concerns might arise in the context of a judgment were described as follows:

> "[M]any events would have to occur before [defendant] would be prejudiced by an inability to assert the defense of *res judicata* successfully. Specifically, (1) the class action would have to be tried to judgment, despite the greater likelihood that the case would instead be settled; (2) the class would have to lose on the merits; (3) an absent class member would have to bring a subsequent lawsuit in [a foreign] court, despite such practical deterrents as the unavailability of contingent-fee representation or a class action vehicle in those courts; (4) the absent class member would have to succeed in establishing jurisdiction over the defendants in that foreign court; (5) the foreign class member would have to convince the foreign court to ignore this Court's ruling and render judgment in its favor on the merits; and (6) the absent class member would have to then convince a Bermuda court to enforce the foreign judgment and ignore the judgment rendered by this Court."

Cromer, 205 F.R.D. at 135 n.32.

can fashion a proof-of-claim mechanism intended to bind all participants and discourage relitigation. *See Cromer*, 205 F.R.D. at 135. While it could be argued that practical considerations weigh strongly in favor of allowing all foreign purchasers to participate in plaintiffs' proposed class, the Court elects to proceed with caution and limit the class to foreign shareholders whose courts, in the unlikely event of successive litigations, are likely to give *res judicata* effect to any judgment herein. This double layer of security should allay defendants' legitimate concerns, and argues in favor of including French, British and Dutch shareholders in the proposed class.

3. Manageability

In determining whether a class action is a superior method of adjudication for a particular action, courts must also consider the management difficulties likely to be encountered if the action is continued as a class suit, such as the burden of complying with Rule 23's notice requirements. *See* 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1780, at 187–90. The determination of whether a particular action is manageable is "peculiarly" within the discretion of the district court. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2001).

Rule 23(c)(2) requires that "notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class." Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 388. Rule 23(c)(2) states that the required notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Further,

> [t]he notice must concisely and clearly state in plain, easily understood language: the nature of the action, the definition of the class certified, the class claims, issues or defenses, that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under Rule 23(c)(3).

Id. Defendants argue that because Vivendi does not keep, does not have access to, and does not have the right to access information that would enable individual notice to shareholders carrying "bearer shares," individual notice would only be possible to a small number of European class members holding "registered shares." (*See* Bisiaux Decl. ¶ 9; Heiser Decl. ¶¶ 13, 23.) Publication notice in a number of foreign countries and in a variety of foreign languages, defendants' argue, would be unmanageable and insufficient to comport with due process.

While individual notice, where reasonably possible, is required, when class members' names and addresses may not be ascertained by reasonable effort, publication notice has been deemed adequate to satisfy due process. *See Eisen*, 417 U.S. at 173 (requiring individual notice to all class members whose names and addresses may be ascertained through reasonable effort); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (finding notice by publication constitutionally sufficient as to trust beneficiaries whose names and addresses are unknown). As long as the Court is persuaded that "class counsel acted reasonably in selecting means likely to inform persons affected," notice will be considered adequate. *Denney v. Jenkins & Gilchrist*, No. 02 Civ. 5460, 2005 WL 388562, at *20 (S.D.N.Y. Feb. 18, 2005); *see also In re Western Union Money Transfer Litig.*,

No. 01 Civ. 0335 (CPS), 2004 WL 3079932, at *5 (E.D.N.Y. Oct. 19, 2004) (finding, in case involving class partially comprised of foreign class members, that individual notice must be sent to all class members identifiable in defendant's computer database, and requiring publication notice including, *inter alia*, "media outreach in the form of a press release, video news release, and radio news release, to be translated into various foreign languages and distributed internationally"); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) (describing notice of settlement to foreign class members as including direct mail notice to ascertainable members, and publication notice including, *inter alia*, a widespread notice campaign in foreign newspapers, promotional announcements in key foreign cities.); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 144 (E.D.N.Y. 2000) (approving multi-faceted notice plan involving direct mail, worldwide publication, public relations, Internet and grass roots community outreach in light of inability to send notice exclusively by direct mail). Indeed, in a recent class action settlement including global purchasers of Royal Ahold N.V. American Depository Receipts and/or ordinary shares, the United States District Court for the District of Maryland found that notice including direct mailings to all reasonably identifiable persons and entities, posting of documents on websites, and publication of notice in numerous different countries and different languages "fully satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process." *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 437 F. Supp. 2d 467, 472 (D. Md. 2006).

In response to defendants' manageability concerns, plaintiffs have filed a comprehensive affidavit outlining the effectiveness of its proposed method of providing notice in foreign countries. (*See* Affidavit of Todd B. Hilsee on Ability to Provide Multi-National Notice to Class Members, Dec. 19, 2005 ("Hilsee Aff.") ¶ 7.) According to this affidavit, the following methods of notification will be used to execute the

dissemination of notice required under Rule 23(c)(2): (1) individual mailed notice to all reasonably identifiable class members; (2) publication notice in appropriate multi-national media to reach, in combination with direct mailings, a high percentage of the shareholders in each country; (3) a neutral informational press release, to be approved by the Court in advance, announcing the commencement of the notice program to increase awareness; (4) notice through any shareholder communication channel that might exist, including Vivendi's website; and (5) a neutral website, to be approved by the Court in advance, translated into all relevant language, posting the notices, the plaintiffs' complaint, defendants' answers, the class certification order; an exclusion request form, and other relevant documents. (*Id.* ¶ 11.) Although the issue of executing appropriate notice will necessarily be revisited, for purposes of considering plaintiffs' motion to certify a class the Court is satisfied that plaintiffs intend to provide individual notice to those class members whose names and addresses are ascertainable, and that plaintiffs' proposed form of publication notice, while complex, will prove both manageable and the best means practicable of providing notice.[22] At this stage, "the issue of foreign notice is not sufficiently grave to defeat class certification." *In re Lloyd's*, 1998 WL 50211, at *16; *cf. In re DaimlerChrysler*, 215 F.R.D. at 301 (noting difficulties involved in maintaining class including foreign investors, and observing that lead plaintiffs had not adequately

[22] Defendants' contention that providing notice to foreign class members is unmanageable is further undercut by the recent approval by Judge P. Kevin Castel of a comprehensive program to provide notice to eligible claimants of money received from the settlement between the Securities Exchange Commission and Vivendi, Messier and Hannezo for the violation of securities laws. *See SEC v. Vivendi Universal, S.A.*, No. 03 Civ. 10195 (PKC) (S.D.N.Y. Dec. 18, 2006). The notice plan was in many respects similar to the one proposed by Hilsee in this proceeding. While that decision is of court not binding on the Court, it suggests that it is realistic to provide notice to foreign class members involved in this very case.

responded to defendants' concerns relating to class management).

IV. Subclasses

Defendants argue that there is no single integrated worldwide market for Vivendi ordinary shares and Vivendi ADSs and, therefore, that a single class consisting of holders of both securities cannot be certified. (Opp'n 4–6). Implicit in their argument is the contention that if plaintiffs' motion for certification is granted, separate subclasses should be established for purchasers of ADSs and for purchasers of ordinary shares. The Court has the authority under Rule 23(c)(4)(B) of the Federal Rules of Civil Procedure to divide a class into subclasses. The existence of divergent interests is the primary reason to establish subclasses. *See* 1 Conte & Newberg, *supra*, § 8:12. Defendants argue that a single class cannot be certified because American and European stock markets are not fully integrated and, therefore, each group of purchasers will require separate proof on the issues of reliance and damages. (Defs.' Sur-Reply Mem. 8-9). According to defendants' expert, Professor Gompers, there are two district trading markets because (1) U.S.-based investors faced a foreign exchange risk not faced by foreign investors; and (2) investors in each security followed different trading strategies and had different trading opportunities because of the time zone difference between the markets. (Declaration of Paul A. Gompers in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Oct. 3, 2005, ¶ 6.) The lack of full integration is evidenced by market metrics that show segmentation and an alleged market lag with news being incorporated into the price of ordinary shares on the Paris Bourse before impacting the price of ADSs on the NYSE. (*Id.* ¶¶ 40–44.) Plaintiffs present their own expert, Jane D. Nettesheim, who opines that the markets for Vivendi ordinary shares and ADSs are "highly integrated," although concededly not "perfectly integrated." (Declaration of Jane

D. Nettesheim in Support of Plaintiffs' Motion for Class Certification, Dec. 19, 2005, ¶ 7.) Analyzing the relative prices of each security during the period where both markets are trading, Nettesheim finds that prices were "almost always effectively equivalent." (*Id.* ¶ 8 & Exs. 4, 5.) While the NYSE and the Bourse may not be perfectly integrated, such that Vivendi ordinary shares and ADSs are perfect substitutes with identical prices and returns, this distinction does not require creation of subclasses. It is undisputed that the two markets are highly integrated and nothing in defendants' submission supports the proposition that such minor inefficiencies between the markets that may exist will have any impact on class-wide proof of the element of reliance. And small differences in returns experienced by holders of ADSs and ordinary shares may affect the amount of damage but unlikely to alter the methodologies of calculation, at least to a degree necessary to warrant, at this juncture, the creation of subclasses.

CONCLUSION

Consistent with the foregoing, plaintiff's motion to certify the class [234] is GRANTED in part. A class is hereby certified consisting of all persons from the United States, France, England, and the Netherlands who purchased or otherwise acquired ordinary shares or American Depository Shares of Vivendi Universal, S.A. between October 30, 2000 and August 14, 2002.

SO ORDERED.

Dated: New York, New York
May 21, 2007

/s/ Richard J. Holwell
Richard J. Holwell
United States District Judge

APPENDIX C

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ENTERED MARCH 26, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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02 Civ. 5571
(RJH) (HBP)

IN RE VIVENDI UNIVERSAL, S.A.
SECURITIES LITIGATION

MEMORANDUM OPINION AND ORDER

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Plaintiffs bring this securities fraud class action against defendants Vivendi Universal, S.A. ("Vivendi") and its two most senior former officers, Jean-Marie Messier (former CEO) and Guillaume Hannezo (former CFO), individually and on behalf of similarly situated Vivendi security purchasers. Plaintiffs allege that defendants' materially false and misleading statements caused Vivendi securities to trade at artificially inflated prices, and further, that defendants induced them to purchase or otherwise acquire Vivendi securities pursuant to a registration statement and prospectus dated October 30, 2000, issued in connection with the December 8, 2000 three-way merger of Vivendi, Seagram Company Limited ("Seagram") and Canal Plus, S.A. ("Canal Plus"), in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, and Sections 11, 12(a) , and 15 of the Securities Act of 1933 ("Securities Act"), as amended, 15 U.S.C. § 77k, respectively.[1]

[1] The Section 12(a)(2) claim as alleged against defendant Hannezo in his individual capacity was dismissed in *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 187 (S.D.N.Y. 2003), and was not repleaded

Plaintiffs now move to certify a class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure consisting of all persons, foreign and domestic, who purchased or otherwise acquired ordinary shares or American Depository Shares ("ADSs") of Vivendi Universal, S.A. between October 20, 2000 and August 14, 2002. For the reasons discussed below, the Court grants plaintiffs' motion [234] in part and denies it in part.

BACKGROUND

Prior History

This litigation was commenced on July 18, 2002 with the filing of the original complaint. On August 19, 2002, plaintiffs filed an amended consolidated complaint. By Order dated October 1, 2002, the Hon. Harold Baer, Jr., to whom this action was originally assigned, consolidated fourteen related actions against Vivendi. On January 7, 2003, plaintiffs filed a consolidated class action complaint. Additional shareholder cases were consolidated herewith by Orders dated July 25, 2003 and September 3, 2003. By notice dated January February 24, 2003, defendants moved to dismiss the consolidated class action complaint arguing, *inter alia*, that the Court lacked subject matter jurisdiction over the claims brought by foreign class members who acquired Vivendi's ordinary shares on foreign exchanges. Applying the "conduct test" to determine whether extraterritorial application of the federal securities laws was warranted, Judge Baer, by opinion dated November 4, 2003, denied defendants' motion to dismiss for lack of subject matter jurisdiction. *See In re Vivendi Universal, S.A.*, 381 F. Supp. 2d at 169. Judge Baer concluded that plaintiffs' complaint adequately alleged that "'defendants' conduct in the United

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in the first amended consolidated class action complaint. (*See* Stipulation and Order [107] , Dec. 17, 2003.) The Section 12(a)(2) claim as alleged against defendant Messier remains.

States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad.'" *Id.* (quoting *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991)); *see also id.* at 170 (inferring "that the alleged fraud on the American exchange was a 'substantial' or 'significant contributing cause' of [foreign investor's] decision[s] to purchase [Vivendi's] stock abroad") (bracketed language in original, citation omitted). Plaintiffs filed a first amended consolidated class action complaint ("FACC") on November 24, 2003. Shortly thereafter, on December 4, 2003 this case was reassigned to this Court. Defendants then moved for reconsideration of Judge Baer's order, which this Court denied by order dated September 21, 2004. The Court issued a separate Memorandum Opinion and Order addressing one of the many issues raised in defendants' motions for reconsideration; namely, whether this Court has subject matter jurisdiction over foreign plaintiffs' claims pursuant to Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. *See In re Vivendi Universal, S.A.*, No. 02 Civ. 5571 (RJH), 2004 WL 2375830 (S.D.N.Y. Oct. 22, 2004). In concluding that the claims of foreign class members who acquired Vivendi's ordinary shares on foreign exchanges were properly before the Court and subject to U.S. federal securities laws, the Court reasoned that the United States–based conduct alleged by plaintiffs "significantly contributed to the alleged fraud and that such conduct directly caused foreign investors' alleged losses." *Id.* at *7 (citing *Europe & Overseas Commodities Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128–29 (2d Cir. 1998)).

By notice dated July 15, 2005, plaintiffs filed a substituted motion to certify a class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure.[2] As

[2] In the First Amended Consolidated Complaint, plaintiffs defined the proposed class as follows:

noted, the proposed class consists of all persons who purchased or otherwise acquired Vivendi ordinary shares or ADSs between October 30, 2000 and August 14, 2002. The motion seeks appointment of plaintiffs Olivier M. Gerard, the Retirement System for General Employees of the City of Miami Beach ("RSMB"), Bruce Doniger, Gerard Morel, Capital Invest Die Kapitalanlagegesellschaft der Bank Austria Creditanstalt Gruppe GmbH (in its capacity as manager of and attorney-in-fact for APK EU-Big Caps Fund) ("Capital Invest"), and William Cavanagh (collectively, "proposed class representatives"), as class representatives, and Milberg, Weiss, Bershad & Shulman LLP and Abbey Gardy, LLP as class counsel. (*Id.*)

Factual Background

Vivendi is a corporation organized under the laws of France. It is a global conglomerate engaged in business in

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(a) on behalf of themselves and all persons who purchased or otherwise acquired the common stock and American Depository Shares ("ADSs") of Vivendi (the "Purchaser Class") between October 30, 2000 and August 14, 2002 inclusive (the "Class Period"), alleging violations of the Securities Exchange Act of 1934 (the "Exchange Act"); (b) on behalf of themselves and all persons who acquired Vivendi's common stock or ADSs (the "Merger Subclass") pursuant to a registration statement and prospectus dated October 30, 2000 issued in connection with the three-way merger (the "Merger") of Vivendi, S.A., The Seagram Company Limited ("Seagram") and Canal Plus, S.A. ("Canal Plus") that created Vivendi Universal, S.A., alleging violations of the Securities Act of 1933 (the "Securities Act"); and (c) on behalf of themselves and all persons who were shareholders of Vivendi or Seagram as of November 25, 2000 and entitled to vote on the Merger (the "Proxy Subclass") pursuant to the Joint Proxy Statement-Prospectus issued in connection with the Merger, alleging violations of the Exchange Act.

(FACC ¶ 1.) Plaintiffs' class certification motion and supporting memoranda do not propose any subclasses for certification.

two primary areas: "Media and Communications" and "Environmental Services." (FACC ¶ 30.) Throughout the class period, Vivendi's total number of outstanding shares (ordinary shares and ADSs inclusive) was approximately 1.08 billion. (Declaration of François Bisiaux in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 30, 2005 ("Bisiaux Decl."), Exs. 1–5.) Approximately twenty-five percent of these were held by United States shareholders. (*Id.*) Around thirty-seven percent of Vivendi's total shares were held by French shareholders. (*Id.*) The remainder of Vivendi's shares were held predominantly by non-French but European persons or entities, and a small percentage (around five percent) was consistently held by shareholders in other unidentified countries. (*Id.*) During this time, virtually all of Vivendi's ADSs—which traded on the NYSE—were held by persons or entities in North America, while virtually all of Vivendi's ordinary shares—traded predominantly on the Paris Bourse—were held by persons or entities outside the United States, predominantly in France and the rest of Europe. (Bisiaux Decl. ¶ 7.)

Beginning in June of 1996, at which time defendant Messier became CEO and defendant Hannezo was CFO, Vivendi (then Générale des Eaux, and later, as of April 1999, Vivendi, S.A.) embarked upon a massive acquisitions venture, which included a number of multi-billion dollar purchases. (FACC ¶¶ 48–51.) Vivendi purchased substantial equity positions in several U.S. companies and non-U.S. companies by using Vivendi stock as payment and by borrowing cash against future earnings. Financing this growth strategy caused Vivendi to accumulate sizeable debt. (*Id.* ¶ 50.) Plaintiffs allege that in order to sustain Vivendi's growth strategy, the company was compelled to continue reporting favorable financial results (*see id.* ¶ 53), resulting in a series of false and misleading public statements reporting "better than expected" and "strong" financial results, while consistently denying rumored problems (*see generally id.*

¶¶ 56–113), and the filing of financial statements with the United States Securities and Exchange Commission ("SEC") that were materially false and misleading because, *inter alia*, they failed to timely record goodwill impairments[3] and improperly applied generally accepted accounting principles ("GAAP") (*see generally id.* ¶¶ 54–55, 119–80).

As discussed in Judge Baer's prior opinion denying defendants' motion to dismiss, 381 F. Supp. 2d 158, and this Court's prior supplemental opinion denying defendants' motion for reconsideration, 2004 WL 2375830, the fraud alleged in the FACC was perpetrated, in important part, in the United States. Vivendi's rapid-expansion scheme involved the acquisition of numerous well-known U.S. entertainment and publishing companies, such as Universal Studios, Houghton Mifflin and USA Networks (FACC ¶ 23), and in order to successfully accomplish this plan, it took on a $21 billion debt while, allegedly, fraudulently assuring all investors through false and misleading reports filed with the SEC and news releases that it had sufficient cash-flow to manage its debts (*id.* ¶¶ 24, 54–192). Significantly, both of the alleged principal actors in this scheme, Messier and Hannezo, moved to the United States during 2001. Messier, in particular, moved his primary residence to New York in September 2001, and spent half of his time in the United States from that time through the end of the class period (August 31, 2002), for the stated purpose of increasing United States investments in Vivendi. (*Id.* ¶¶ 69, 77, 90–92, 105.) Many of the statements alleged to be false and misleading were made by defendant Messier after he had

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[3] Goodwill is the excess of the purchase price over the fair market value of an asset. It reflects the value of intangible assets like reputation, brand name, good customer relations, good employee relations, any patents and proprietary technology, and other intangibles that improve a company's business. Goodwill is a value in a company's balance sheet, and is amortized over a period of time.

moved to New York. *See* 2004 WL 2375830, at *4; (*see also* FACC ¶¶ 73–76, 81–97.)

Following the December 8, 2000 merger of Vivendi, Seagram, and Canal Plus, Vivendi repeatedly predicted "strong growth prospects" and touted financial results as exceeding even their "too ambitious" expectations. (*Id.* ¶ 57–68.) In September 2001— the same time that Messier and Hannezo moved to the United States—rumors began to circulate that Vivendi's earnings would be disappointing. Messier responded by consistently denying any problems—indeed, until the day before his ultimate resignation he disavowed there was any serious problem—which quelled some of the negative speculation. (*See id.* ¶¶ 73–77.) In late 2001, Vivendi announced its acquisition of USA Networks for $10.3 billion, and reported that the transaction would increase Vivendi's net free cash flow by a projected $350 million. (*Id.* ¶¶ 80–81.) Throughout the spring of 2002, Vivendi (and Messier) continued to make positive statements in the press to "dispel concerns about the Compan[y's] debt levels and accounting practices." (*Id.* ¶83; *see also id.* ¶¶ 84–87, 89, 94–97.) However, on May 3, 2002, Moody's lowered Vivendi's long-term debt rating to one notch above "junk" status assigned to speculative investments, due to concerns that Vivendi "might not be able to reduce debts as quickly and comprehensively as planned." (*Id.* ¶ 99.) In response, Vivendi downplayed the rating and announced it had "no impact on Vivendi Universal's cash situation," which it described as "comfortable" and capable of financing Vivendi's continued debt reduction. (*Id.* ¶¶ 100, 102–03.)

In response to continued concerns about Vivendi's debt levels, a June 25, 2002 press release was issued, noting steps taken to reduce debt and that its cash situation was not precarious, and Messier held a June 26, 2002 conference call to assure investors there was "no hidden liability" and expressing confidence with respect to Vivendi's debt and cash outlook. (*Id.* ¶¶ 104–05.) On July 2, 2002, Messier e-

mailed his employees stating that despite reports that Vivendi was in danger of default, there were no hidden risks in the company's accounting. (*Id.* ¶ 109.) The very next day, however, Messier resigned and Vivendi's securities prices collapsed. (*Id.*) Vivendi issued a press release through new management acknowledging its "short-term liquidity issue," though Messier continued to claim that Vivendi's financial statements were transparent. (*Id.* ¶ 110.) Contrary to Vivendi's numerous press releases, financial statements, and SEC filings throughout the class period, plaintiffs allege that the company was in fact on the brink of financial disaster. At the time of the USA Networks acquisition, announced on December 17, 2001 (*id.* ¶ 8), "Vivendi was already in dire financial straits," despite representations made to the contrary by Messier to investors and the board of directors (*id.* ¶ 184). Vivendi was allegedly on the verge of insolvency by the end of 2001, and had barely enough "cash needed to pay the bills" as of May 2002. (*Id.* ¶ 185.) Nevertheless, Vivendi had continued to reassure investors that it could meet its obligations for the next twelve months, despite being privately advised of its dire financial outlook. (*Id.* ¶ 186.)

On August 14, 2002, new management announced that Vivendi had suffered a €12 billion net loss for the first half of 2002 and would take a €11 billion goodwill write-down of depreciated assets, the same day that Standard & Poor's rated Vivendi's long-term corporate credit at junk status. (*Id.* ¶ 114.) New management later admitted that Vivendi "would have been forced to declare bankruptcy within 10 days if Jean-Marie Messier had not resigned." (*Id.* ¶ 187.)

DISCUSSION

I. Legal Standard

A district court's analysis of a class certification request generally proceeds in two steps, both of which are governed by Rule 23 of the Federal Rules of Civil Procedure. As a

threshold matter, the court must be persuaded, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). Rule 23(a) provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

If a court determines that the Rule 23(a) requirements have been met, it must then decide whether the class is maintainable pursuant to one of the subsections of Rule 23(b), which govern, *inter alia*, the form of available relief and the rights of absent class members. When seeking to certify a class pursuant to Rule 23(b)(3), plaintiffs must meet the following two additional criteria: (1) questions of law or fact common to class members must predominate over any questions affecting individual members; and (2) the class action device must be superior to any other method of adjudication. Fed. R. Civ. P. 23(b)(3). The requirement of "rigorous analysis" to ensure "actual, not presumed conformance" with Rule 23(a) applies with "equal force to all Rule 23 requirements, including those set forth in Rule 23(b)(3)." *Miles v. Merrill Lynch & Co. (In re Initial Public Offering Sec. Litig.)*, 471 F.3d 24, 33 & n.3 (2d Cir. 2006) (citing *Falcon*, 457 U.S. at 160–61). Thus it is not sufficient for plaintiffs to make merely "some showing" that the requirements of Rule 23 have been met. *Id.* at 35–36 (citing and distinguishing *Caridad v. Metro-North Commuter*

Railroad, 191 F.3d 283, 292 (2d Cir. 1999) and *In re Visa Check/Master Money Antitrust Litigation*, 280 F.3d 124, 134-35 (2d Cir. 2001)). To the contrary, the following standard now applies to class certification motions in this circuit:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.

In re IPO Sec. Litig., 471 F.3d at 41. With these principles in mind, the Court turns to the Rule 23 analysis.

II. Rule 23(a)

A. Numerosity

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Fed.

R. Civ. P. 23(a)(1). "Impracticability means difficulty or inconvenience of joinder [not] . . . impossibility of joinder," *In re Blech Sec. Litig.*, 187 F.R.D. 97, 103 (S.D.N.Y. 1999) (citation omitted), and the Second Circuit has observed that "numerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), *cert. denied*, 515 U.S. 1122 (1995) (citing 1 *Newberg on Class Actions* § 3.05 (2d ed. 1985)); *see also Presbyterian Church v. Talisman Energy, Inc.*, 226 F.R.D. 456, 466 (S.D.N.Y. 2005) ("Numerosity is presumed when a class consists of forty or more members."). "Precise quantification of the class members is not necessary because a court may make common sense assumptions regarding numerosity." *In re Blech Sec. Litig.*, 187 F.R.D. at 103 (citations omitted); *see also de la Fuente v. DCI Telecomms., Inc.*, 206 F.R.D. 369, 390 (S.D.N.Y. 2002); *Weissman v. ABC Fin. Servs., Inc.*, 203 F.R.D. 81, 84 (E.D.N.Y. 2001).

"In securities fraud class actions relating to publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *Teachers' Ret. Sys. of La. v. ACLN Ltd.*, No. 01 Civ. 11814 (LAP), 2004 WL 2997957, at *3 (S.D.N.Y. Dec. 27, 2004) (citations and internal quotation marks omitted)); *see also In re Globalstar Sec. Litig.*, No. 01 Civ. 1748 (PKC), 2004 WL 2754674, at *3–*4 (S.D.N.Y. Dec. 1, 2004) ("[I]t is not unusual for district courts to certify plaintiff classes in securities actions based on the volume of outstanding shares." (citations omitted)); *In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277 (S.D.N.Y. 2002) ("Class certification is frequently appropriate in securities fraud cases involving a large number of shares traded publicly in an established market."); *In re Frontier Group Ins., Inc. Sec. Litig.*, 172 F.R.D. 31, 40 (E.D.N.Y. 1997). With more than 107 million ADSs and approximately 1 billion ordinary shares outstanding during the relevant class period, plaintiffs have established that joinder is

impracticable and that the proposed class satisfies the numerosity requirement. (*See* FACC ¶ 41; Bisiaux Decl. Ex. 2 (indicating 1.086 billion outstanding Vivendi shares, ordinary shares and ADSs inclusive, as of June 30, 2001).)

B. Commonality

The class certification prerequisite of commonality requires that "there are questions of law or fact common to the class . . . ." Fed. R. Civ. P. 23(a)(2); *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (per curiam) ("[P]laintiffs' grievances [must] share a common question of law or of fact."). Not every "issue[] must be identical as to each [class] member, but . . . plaintiff [must] identify some unifying thread among the members' claims that warrants class treatment." *Cutler v. Perales*, 128 F.R.D 39, 44 (S.D.N.Y. 1989) (internal quotation marks and citation omitted). The commonality requirement "has been applied permissively" in securities fraud litigation. *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855 (RMB), 2003 WL 22077464, at *3 (S.D.N.Y. Sept. 8, 2003) (internal quotation marks omitted); *see also In re Frontier*, 172 F.R.D. at 40. Here, plaintiffs allege the following questions of fact or law are common to all members of the proposed class: (1) whether defendants violated the securities laws by the acts and conduct alleged in the FACC; (2) whether defendants issued false and misleading statements during the class period; (3) whether defendants acted with scienter in issuing materially false and misleading statements; (4) whether the market prices of Vivendi ordinary shares and ADSs during the class period were artificially inflated because of defendants' misconduct, and (5) whether the members of the class sustained damages, and, if so, what is the appropriate measure of damages. (FACC ¶ 45.) *Cf. In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 2003 WL 22509414, at *3 (S.D.N.Y. Nov. 6, 2003) (finding commonality requirement satisfied where plaintiffs raised common issues as to whether defendants' public filings and

statements contained material misstatements, whether the defendants acted with scienter in misrepresenting material facts in the company's public filings and press releases, and whether the damages to the investors were caused by the defendants' misstatements); *In re Ashanti Goldfields Sec. Litig.*, No. CV 00-0717 (DGT), 2004 WL 626810, at *12 (E.D.N.Y. Mar. 30, 2004) (finding commonality on similar allegations). Defendants do not dispute commonality. Plaintiffs have adequately demonstrated that these claims are common to the members of the proposed class, and the Court finds the commonality requirement is satisfied.

C. Typicality and Adequacy

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "While the commonality inquiry establishes the existence of a certifiable class, the typicality inquiry focuses on whether the claims of the putative class representatives are typical of the class sharing common questions." *In re Frontier*, 172 F.R.D. at 40. Typicality requires that "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *Marisol A. v. Giuliani*, 929 F. Supp. 662, 691 (S.D.N.Y. 1996), *aff'd* 126 F.3d 372 (2d Cir. 1997); *see also Robidoux v. Celani*, 987 F.2d 931, 936–36 (2d Cir. 1993) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims."). Rule 23(a)(4) requires plaintiffs to establish that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This showing requires that plaintiffs demonstrate that the proposed class representatives have no "interests [that] are antagonistic to the interest of the other members of the class." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60

(2d Cir. 2000). As many courts have observed, the issues of typicality and adequacy tend to merge because they "serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13.

In this case, proposed class representatives argue that the typicality requirement is met because their claims "arise out of the same uniform pattern of conduct—i.e., defendants' failure to disclose that Vivendi's operations and financial condition were dramatically weaker than what their public statements portrayed." (Pls.' Supp. Mem. 11.) In the First Amended Consolidated Complaint, named plaintiffs, like the other purported class members, have asserted that they purchased or otherwise acquired Vivendi securities during the class period, and were injured by defendants' false and misleading representations made throughout the class period in violation of the securities laws. Central to all the proposed class representatives claims is defendants' alleged course of conduct throughout the class period. In prosecuting their case, plaintiffs will necessarily seek to develop facts relating to the alleged accounting irregularities and the dissemination of allegedly false or misleading statements underlying their claims. Such allegations are generally considered sufficient to satisfy the typicality requirement. *See, e.g., In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 2003 WL 22509414, at *3 (S.D.N.Y. Nov. 6, 2003); *In re WorldCom Inc. Sec. Litig.*, 219 F.R.D. 267, 280–81 (S.D.N.Y. 2003). Furthermore, defendants' individualized arguments regarding the adequacy and typicality of the proposed class representatives are unavailing. The Court will address seriatim the arguments made with respect to the six named plaintiffs.

1. Olivier Gerard

Proposed class representative Gerard is a resident of France who, on December 11, 2000, exchanged Vivendi, S.A. shares for Vivendi Universal shares pursuant to the three-way merger with Seagram and Canal Plus. (*See* Deposition of Olivier Marie-Guillaume Gerard, June 24, 2005 ("Gerard Dep.") at 81:05–82:13; Gerard Second Corrected Certification, June 24, 2005 at Schedule A, Zach Decl. Ex. 7.)

Defendants submit that Gerard is not an adequate class representative for two reasons. First, defendants argue that persons such as Gerard who obtained Vivendi Universal shares and/or ADSs only in the one-to-one exchange of Vivendi, S.A. securities may not be properly included in the putative class, because such persons[4] did not suffer economic damage and cannot prove materiality. (*See* Defs.' Opp'n Mem. ("Opp'n") 21–23, 27.)

Defendants argue that this group of class members, as preexisting Vivendi shareholders, "cannot show that the alleged misstatement inflating the value of shares or ADSs that they already owned was material to them or caused them any economic damage." (Opp'n 21.)

Plaintiffs propose as a solution to defendants' concerns that the words "and were damaged thereby" be inserted into the class definition. Plaintiffs also argue that it would be premature to exclude class members who have exchanged Vivendi S.A. shares for Vivendi Universal shares because the question of whether defendants' misstatements were material

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[4] Defendants' contention that all foreign persons should be excluded from the proposed class is discussed *infra* in connection with an evaluation of whether a class action including foreign shareholders would be superior to alternative methods of adjudication.

to these plaintiffs cannot be determined at the class certification stage.

Given the teaching of *In re IPO Sec. Litig.*, 471 F.3d at 41–42, it is not inappropriate to consider either damages or materiality in assessing the typicality of the individual plaintiffs' claims, even though some assessment of the merits of their claims is required. However, the Court is not persuaded that either issue precludes a finding that the typicality requirement is satisfied here. Materiality for all class members will turn on the nature and accuracy of all defendants public statements including, obviously, those made in connection with the three-way merger of Vivendi, Seagram and Canal Plus in December, 2000. That Vivendi S.A. shareholders received Vivendi Universal shares as a result of the merger does not alter the materiality of defendants alleged misstatements to plaintiff-shareholders' decision to approve the merger and accept shares in a new entity. And to the extent that, as alleged, defendants were constructing an ever-expanding house of cards, old Vivendi S.A. shareholders who accepted shares in Vivendi Universal were likely damaged thereby.[5] Therefore, the Court declines

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[5] In addition to opposing the inclusion of those who acquired Vivendi shares through the one-for-one exchange, defendants oppose the inclusion of so-called in-and-out purchasers in any class certified—i.e., those who purchased shares and sold them during the class period. Defendants do not oppose the appointment of any of the proposed class representatives on this basis. However, even if they did raise such an argument, courts have consistently found that this does not render a representative's claim atypical. *See, e.g., In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 69–71 (S.D.N.Y. 1999) (rejecting defendants' argument that in-and-out purchaser proposed as class representative was inadequate because, *inter alia*, he was not injured because he sold as well as purchased at inflated prices); *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1215 (S.D.N.Y. 1992) (rejecting attempt to disqualify proposed class representatives because of the timing of their purchases, and stating that although timing issues could eventually surface differing interests among class members, "the greater weight of recent authority militates denying class certification on that ground" (internal citation omitted)); *In*

to exclude members of the class who acquired their shares in the one-to-one exchange, including Gerard as class representative, on the basis of defendants' arguments regarding damages or materiality.

Defendants also allege that Gerard is incapable of performing the fiduciary responsibilities as a class representative because Gerard admitted to destroying documents. (Opp'n 27–28 n.23.) The documents to which defendants allude, however, appear to be French and other European newspaper articles relating to the Vivendi scandal, and perhaps some personal notes taken by Gerard during meetings with his French attorney. (Gerard Dep. 28:24–29:16, 30:23–31:02.) Gerard testified that he discarded the news articles because he believed the attorneys in this matter had collected all the relevant documentation and articles published in the press, and there was no reason for him to keep it. (*Id.* at 29:11–30:05.) Defendants cite no authority to support the proposition that such conduct renders Gerard inadequate to represent the interests of the class, and the Court finds Gerard to be an adequate class representative. *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 88 (S.D.N.Y. 2004) (rejecting defendants' credibility argument to defeat appointment of named plaintiff as class representative where "[t]here [was] no evidence that any of the conduct here was the result of bad faith or an attempt to deceive defendants or the court").

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re Sumitomo Copper Litig., 182 F.R.D. 85 (S.D.N.Y. 1998) (rejecting defendants' arguments regarding conflicts created by inclusion of in-and-out purchasers in proposed subclasses and noting that "it is well settled in this Circuit that factual differences in the amount of damages, date, size or manner of purchase, the type of purchaser, the presence of both purchasers and sellers, and other such concerns will not defeat class action certification when plaintiffs allege that the same unlawful course of conduct affected all members of the proposed class" (citing *Green v. Wolf*, 406 F.2d 291, 299–301 (2d Cir. 1968), *cert. denied sub nom. Troster, Singer & Co. v. Green*, 395 U.S. 977 (1969))).

2. Gerard Morel

Gerard Morel is also a French resident who exchanged his shares in Vivendi, S.A. and Canal Plus for Vivendi Universal shares after the December 2000 merger. (Declaration of Gerard Morel, Feb. 19, 2005 ("Morel Decl.") at Schedule A, Zach Decl. Ex. 8.) He also bought and sold Vivendi ordinary shares on the Paris Bourse during the proposed class period. (*Id.*) His last transaction in Vivendi securities occurred on January 11, 2002. (*Id.*)

Defendants argue that Morel only has standing to represent a class including Europeans who purchased Vivendi securities on a European exchange up to the latest date on which he engaged in a transaction involving Vivendi stock. (Opp'n 28.) Without an adequate proposed class representative who purchased Vivendi ordinary shares on the Paris Bourse after January 11, 2002, defendants argue, the period of any class including French shareholders cannot extend beyond this date.[6] Defendants further argue that inconsistencies in Morel's testimony, submissions, and document production on the issue of his transactions in Vivendi securities will become a focal point of cross-examination and unique defenses at trial to the detriment of the class. (*Id.* at 28 n.25.)

With respect to class representative standing, it is well established that where, as here, plaintiffs allege that their losses were the result of a sustained course of conduct that propped up defendant's stock price throughout the class period, the class may be represented by an individual who purchased his shares prior to the close of the class period. *See Robbins v. Moore Med. Corp.*, 788 F. Supp. 179, 187 (S.D.N.Y. 1992) (finding class representatives entitled to

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[6] Defendants, as noted, object to the inclusion of any foreign shareholders in the proposed class. See *supra*, fn. 5, and the discussion of the issue of superiority, *infra*.

assert Section 10(b) claims "arising from statements made both before and after the purchase date if the statements allegedly were made in furtherance of a common scheme to defraud" (citing *Nicholas v. Poughkeepsie Savings Bank/FSB*, No. 90 Civ. 1607 (RWS), 1990 WL 125154, at *5 (S.D.N.Y. Sept. 27, 1990))); *Zucker v. Sasaki*, 963 F. Supp. 301, 306–07 (S.D.N.Y. 1997) (discussing *Robbins* and noting that where defendants with an identity of interest make a series of "inter-related misstatements" as part of a "common course of conduct," post-purchase statements are relevant to the course of wrongful conduct alleged); *cf. Denny v. Barber*, 576 F.2d 465, 468–69 (2d Cir. 1978) (finding that proposed class representative could not properly represent persons who bought securities in reliance on fraudulent statements where he had purchased before *any* alleged false statements were made). As such, the Court finds that Morel may adequately represent later purchasers. *See Nicholas*, 1990 WL 145154, at *6 (rejecting implication that only someone who bought on the last day of the class period would be able to bring an action on her own behalf or on behalf of the entire class, and stating "there is considerable authority allowing class plaintiffs to represent later purchasers" (internal citations omitted)).

3. Capital Invest

Capital Invest, the fund management company of the Bank Austria Greditanstalt Gruppe GmbH ("Bank Austria"), seeks to represent the claims of APK EU–Big Caps fund ("Big Caps Fund"), in its capacity as manager and attorney-in-fact. (Declaration of Irene Reisenberger, August 30, 2005 ("Reisenberger Decl.") ¶ 2, Zach Decl. Ex. 12.) The sole owner of the shares (i.e., units) in the Big Caps Fund is a large Austrian pension entity known as APK Pensionskasse Aktiengesellschaft ("APK"). The Big Caps Fund obtained Vivendi Universal shares in exchange for previously held Vivendi, S.A. shares, and also purchased and sold Vivendi Universal shares on foreign exchanges, the last purchase of

which occurred on January 21, 2002. (Zach Decl. Exs. 15, 16.) For reasons discussed in greater detail below, Austrian claimants shall be excluded from the class in this action. Therefore, the Court finds it unnecessary to address typicality/adequacy of representation issues as they relate to this plaintiff as it cannot properly serve as a class representative.

4. William Cavanagh

William Cavanagh is a United States resident. He purchased 100 Vivendi Universal ADSs on the NYSE on June 13, 2002. (Zach Decl. Ex. 31, at 21; Deposition of William Cavanaugh, July 29, 2005, Parr Decl. Ex. 24 ("Cavanaugh Dep.") at 170:23–171:07.) Defendants dispute Cavanagh's adequacy as a class representative because of his "striking" lack of knowledge regarding his claim. (Opp'n 34.) Defendants cite the following examples in support of this argument: (1) Cavanagh's inability to recall the year the complaint was filed, the relevant dates for the proposed class period, or how he decided to seek to become a proposed class representative, or to articulate key elements of the claims; (2) Cavanagh's similar inability to testify regarding his transactions in Vivendi securities beyond testifying that he sold his 100 Vivendi Universal shares at some point, though he did not know when or at what price (Cavanaugh Dep. 259:23–260:11, 181:14–182:03); (3) Cavanagh's failure to monitor class counsel, as evidenced by his inability to recollect ever meeting or speaking with any attorney associated with the Milberg Weiss law firm, and only works with attorneys from the law firms of Murray Frank and Abbey Gardy (*id.* at 15:25–16:19, 278:25–280:02).

"The Supreme Court . . . expressly disapproved attacks on the adequacy of a class representative based on the representative's ignorance." *Baffa*, 222 F.3d at 61 (citing *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 370–74 (1966)). Courts in this district have held that "[p]laintiffs are

entitled to rely on the 'expertise of counsel,'" and "a class representative will be found inadequate due to ignorance only when they 'have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *In re Worldcom Inc. Sec. Litig.*, 219 F.R.D. 267, 286 (S.D.N.Y. 2003) (quoting *Baffa*, 222 F.3d at 61); *accord Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077–78 (2d Cir. 1995). "[I]t is well established that 'in complex litigations such as securities actions, a plaintiff need not have expert knowledge of all aspects of the case to qualify as a class representative, and a great deal of reliance upon the expertise of counsel is to be expected.'" *Fogarazzo v. Lehman Bros., Inc.*, 232 F.R.D. 176, 181 (S.D.N.Y. 2005) (quoting *In re AM Int'l, Inc. Sec. Litig.*, 108 F.R.D. 190, 196–97 (S.D.N.Y. 1985)).

Despite defendants' concerns regarding Cavanaugh's imperfect recollections outlined above, there is nothing in the record to suggest that Cavanaugh is unwilling or unable to pursue the litigation on behalf of the class. Cavanaugh's deposition testimony reflects that he is aware that he is a proposed class representative (Cavanaugh Dep. 97:22–97:24), he understands the role carries an obligation "to represent the class members to the best of [his] ability, in discussions with [his] attorney" and an obligation to supervise class counsel (*id.* at 278:04–278:09, 278:25–279:04), he knows the action is against Vivendi and its former CEO and CFO and is aware of the claims (*id.* at 117:20–117:25, 254:10–255:22; 306:02–306:08), and expressed a desire to "vigorously" pursue the case, in consultation with counsel (*id.* at 306:02–306:08). *Cf. Baffa*, 222 F.3d at 62. Defendants' criticism that Cavanaugh is only in communication with one of the two firms appointed as class counsel is insignificant. In light of the foregoing, the Court finds Cavanaugh to be an adequate class representative.

5. RSMB

RSMB administers the pension fund of the retirement system for the general employees of Miami Beach, Florida. In the December 2000 merger, RSMB exchanged Vivendi, S.A. and Canal Plus ADSs for Vivendi Universal ADSs in the three-way merger. (Zach Decl. Ex. 33 at 3.) RSMB did not acquire any other Vivendi Universal securities during the proposed class period. As such, defendants argue that RSMB could only represent North American residents who acquired Vivendi Universal ADSs as part of the merger and does not have standing to bring claims based on alleged misstatements issued after the exchange of shares pursuant to the merger. As discussed *supra* in section 2.C.ii. (discussing adequacy of proposed class representative Gerard Morel), these arguments are unpersuasive in a case such as this, where a common scheme to defraud renders later-made statements relevant to the course of wrongful conduct underlying an earlier purchaser's (or acquirer's) claims.[7]

Defendants further argue that RSMB is an inadequate class representative because RSMB's "most knowledgeable" representative, Rick Rivera, RSMB's pension administrator, lacks sufficient knowledge to demonstrate RSMB is an adequate class representative. Defendants contend that Rivera's testimony demonstrates that RSMB does not understand important aspects of this action or the responsibilities attendant to being a class representative.[8]

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[7] The Court notes that RSMB stands in a slightly different position from Morel in that it held both Vivendi S.A. and Canal Plus shares at the time of the merger. This distinction does not alter the Court's analysis of materiality, damages, or a shareholder's ability to adequately represent shareholders who purchased later in the class period.

[8] For example, Rivera could not (1) describe the scope of the proposed class (Rivera Dep. 107:15–108:07); (2) identify any document relevant to the action that RSMB has reviewed, or state with any certainty that RSMB reviewed the complaint (or understand the term "complaint") (*id.* at 27:07–27:20, 58:02–58:04); (3) state with any certainty that RSMB

However, plaintiffs have established that Rivera understands that the pension fund seeks to be appointed a class representative, in which capacity it would seek damages on behalf of the entire class, and that his responsibilities would include following the case, reviewing documents and filings, and consulting with counsel. (Deposition of Rick Rivera, May 20, 2005 ("Rivera Dep.") 152:21–153:14, 150:02–150:11.) He also understood that as class representative RSMB would have to represent the best interests of the class, which includes all members who sustained damages as a result of Vivendi's alleged fraud. (*Id.* at 153:24–154:03, 107:03–108:07.) He also understood that the complaint alleges that "defendants provided false statements that inflated the stock price." (*Id.* at 59:15–59:23.) The Court has been presented with no evidence suggesting that RSMB will be unable or unwilling to adequately represent the class, or that RSMB has interests antagonistic to those of the class as a whole, which are the relevant inquiries at issue here. The lack of knowledge of which defendants complain does not rise to the sort of ignorance that warrants denial of class representative status. *See, e.g., In re Worldcom*, 219 F.R.D. at 286.

6. Bruce Doniger

Bruce Doniger is a resident of the United States. Doniger acquired Vivendi Universal ADSs in exchange for his previously held Seagram shares following the December

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read its responses to defendants' interrogatories, though he personally verified the responses (*id.* at 73:08–73:25); (4) identify how many times RSMB has spoken with plaintiffs' counsel, or whether RSMB had ever done so within the last year (*id.* at 57:03–57:25); (5) identify the number of shares RSMB acquired during the proposed class period, or when such shares were acquired or sold (*id.* at 85:14–86:09); (6) state with certainty whether RSMB had disposed of all its Vivendi securities during the proposed class period (*id.* at 185:16–186:02); (7) describe the interests of the class members or how RSMB would determine those interests (*id.* at 124:16–124:10).

2000 three-way merger. Defendants argue that Doniger lacks standing to bring claims for alleged misstatements made after he exchanged his shares, and note that there are no other representatives with standing to represent post–December 2000 claims. This argument has already been addressed and rejected by the Court.

Defendants also point out that Doniger is a second cousin to Edgar Bronfman, Sr. and Charles Bronfman (father and uncle, respectively, to Edgar Bronfman, Jr.) and sponsor of former Vivendi Board member Samuel Minzberg. Prior to the December 2000 merger, the principal owners of Seagram were Edgar Bronfman, Jr. and the Bronfman family, which became the largest shareholders of Vivendi following the merger. (FACC ¶ 51.) Edgar Bronfman, Jr. held the position of Executive Vice Chairman of the Vivendi Board until December 2001, at which time he resigned. (FACC ¶ 79.) Defendants further state that Doniger received his Seagram shares because of his familial relationships. (Doniger Dep. 20:03–23:10, 38:23–39:08, 101:11–102:11.) Based on these relationships, defendants appear to argue that Doniger would be subject to unique defenses likely to become the focus at trial, rendering him atypical and prejudicing absent class members. However, defendants do not point to any evidence that Doniger is subject to unique defenses concerning, for example, lack of reliance because of the receipt of nonpublic information obtained by virtue of these relationships. *Cf. Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 475–76 (S.D.N.Y. 1989) (finding proposed class representatives atypical where their deposition testimony reflected that they had received nonpublic information and recommendations from friends and associates). Furthermore, the Court does not find that Doniger's familial relationships, without more, are sufficient to conclude that Doniger has interests antagonistic to those of the class, or that he would be unwilling or unable to fairly and adequately represent the class.

III. Rule 23(b)(3)

Having addressed the requirements of Rule 23(a), the Court now turns to whether Rule 23(b)(3) has been satisfied. Rule 23(b)(3) requires a court to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b). A class certified pursuant to Rule 23(b)(3) is sometimes referred to as an "opt-out" class because Rule 23(c)(2) mandates that members of a class certified under Rule 23(b)(3) be afforded an opportunity to "request exclusion" from that class.[9] Particularly relevant to a purported class including foreign purchasers, anyone who does not affirmatively inform the Court that they wish to be excluded from the class is bound by the final disposition of the case.

A. Predominance of Common Issues

Rule 23(b)(3) allows for certification of a class where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy . . . [and] tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). The Rule 23(b)(3) predominance inquiry "is a more demanding criterion than the commonality inquiry under Rule 23(a). Class-wide issues predominate if resolution of some of the legal or factual questions that

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[9] Rule 23(c)(2)(B) provides, in relevant part, that notice to members of "any class certified under Rule 23(b)(3) . . . must concisely and clearly state in plain, easily understood language . . . that the court will exclude from the class any member who requests exclusion."

qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. Paine Webber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (internal citations and quotation marks omitted). However, the Supreme Court has noted that "[p]redominance is a test readily met in certain cases alleging . . . securities fraud." *Amchem Prods.*, 521 U.S. at 625 (citing Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 385).

In this case, there are common questions of law and fact involving violations of the securities laws based on a common course of conduct directed at the entire class, and that predominate over any individualized questions that may exist. The common issues in this action include whether defendants issued materially false and misleading statements as to Vivendi's earnings (both in connection with a registration statement and prospectus dated October 30, 2000, and thereafter), scienter, reliance, and causation. All plaintiffs will rely on the same or substantially similar documents, statements, and legal theories to prove the defendants' liability. Defendants do not present any argument that the claims at issue here may not be largely resolved by class-wide proof. Indeed, they do not appear to contest that the predominance requirement in met in this case. Because common factual and legal questions predominate over individual issues, the Court determines that this requirement has been satisfied. *See, e.g., In re AOL Time Warner, Inc. Sec. and ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *5 (S.D.N.Y. Apr. 6, 2006) (finding predominance requirement readily met because "allegations of defendants' misrepresentations and the improper inflation of AOL's accounting revenues underlie the factual and legal claims of every Class Member"); *In re Globalstar Sec. Litig.*, No. 01 Civ. 1748 (PKC), 2004 WL 2754674, at *5 (S.D.N.Y. Dec. 1, 2004) (finding predominance prong met where there were common issues with respect to whether defendants

issued materially false and misleading statements as to Globalstar's subscription rate and revenues, scienter, reliance, and causation).

B. Superiority of Class Action Treatment

The superiority requirement asks courts to balance, in terms of fairness and efficiency, the advantages of a class action against those of alternative available methods of adjudication. *See* Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 385 ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."). Rule 23(b)(3) identifies several factors to consider in determining whether a class action is in fact "superior to other available methods for the fair and efficient adjudication of the controversy":

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). This list of pertinent factors is nonexhaustive, *see* Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 386 (1992), "and the purposes of Rule 23 should weigh heavily in this determination," 2 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 4:28 (4th ed. 2002).

1. Interests in Prosecuting Individual Suits; the Extent and Nature of Other Pending Litigation

As the advisory committee's notes to Rule 23 indicate, "[t]he court is to consider the interests of the individual members of the class in controlling their own litigations and carrying them on as they see fit." Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 386. In considering this interest, "the court should inform itself of any litigation actually pending by . . . the individuals," because the existence of pending actions may reveal that "[t]he interests of individuals in conducting separate lawsuits [are] so strong as to call for denial of a class action." *Id.*; *see also In re "Agent Orange" Prod. Liability Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) ("All plaintiffs may not desire class certification . . . because those with strong cases may be better off going it alone.").

As courts have frequently noted, class action treatment is particularly appropriate when plaintiffs seek redress for violations under the securities laws. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 382 (1970); *Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968) ("[A] class action in a federal securities action may well be the appropriate means for expeditious litigation of issues, because a large number of individuals may have been injured, although no one person may have been damaged to a degree which would have induced him to institute litigation solely on his own behalf."); *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) ("[C]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, since the effectiveness of the securities laws may depend in large measure on the application of the class action device." (internal quotation marks and citations omitted)); *In re Blech*, 187 F.R.D. at 101; *Baron v. Commercial & Indus. Bank of Memphis*, No. 75 Civ. 1274 (LBS), 1978 WL 168588, at *2 (S.D.N.Y. Aug. 21, 1978) ("Because most securities fraud

cases involve purchasers' claims which might otherwise be too paltry to justify individual litigation, courts have concluded in securities actions, the class action procedure is not only superior, but probably indispensable for the vindication of plaintiffs' rights . . . and to assure that the securities laws will be vigorously enforced." (internal quotation marks and citation omitted)); 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.03 (3d ed. 2004). In a case such as this, where each individual plaintiff can only have a fraction of the interest in the outcome of the litigation as the defendants, any interest the members of the class might have in individually controlling the prosecution of separate actions is heavily outweighed by the obvious benefits of pressing their claims as a class. *See Amchem*, 521 U.S. at 617 ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997))).

The actions by putative class members currently pending before French courts against Vivendi do not, in the Court's view, change this calculus. According to submissions made by both parties, at present Vivendi is defending two individual shareholder suits filed in the Paris Tribunal de Grande Instance (trial court) in France, *Société Richard Hugo v. Vivendi Universal, S.A.* and *Courage v. Vivendi Universal, S.A.* (Bisiaux Decl. ¶¶ 12–13 & Exs. 8–9).[10] The pendency of these actions does not persuade the Court that any individual shareholder has an interest in conducting separate lawsuits

[10] A third action, *Pasturaud v. Vivendi Universal, S.A.*, a suit by ninety-seven individual shareholders, was dismissed without prejudice due to plaintiffs' failure to register the complaint. (Defs.' Sur-Reply Mem. 1 n.1.)

sufficient to outweigh the advantages to all shareholders of proceeding on a class basis. *See*, Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 386 (noting that even where additional litigation is pending, the interests in conducting separate lawsuits may be "theoretical rather than practical" because, *inter alia*, "the amounts at stake for individuals may be so small that separate suits would be impracticable").

2. Desirability or Undesirability of Concentrating the Litigation of the Claims in this Particular Forum

Plaintiffs' proposed class definition encompasses a significant number of foreign class members; indeed, thirty-seven percent of Vivendi's ordinary shares were held by citizens of France who purchased them on the Bourse, while U.S. investors held twenty-five percent of Vivendi shares in the form of ADSs purchased on the NYSE. (Bisiaux Decl. ¶ 7.) Relying primarily on Judge Friendly's opinion in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975), defendants argue that all foreign plaintiffs must be excluded from the class because it is a "near certainty" that if this action is dismissed, taken to judgment, or settled, defendants would not be able to assert claim prelusion to bar subsequent actions in the countries in which foreign plaintiffs reside. Although defendants do not consistently characterize their argument as such, the Court will consider this aspect of their opposition to be an attack on the superiority of class action treatment of the claims of foreign purchasers.

(a) The "Near Certainty" Test

Bersch involved an action on behalf of all purchasers of stock in a Swiss-based, Canadian corporation asserting claims for violations of the federal securities laws relating to stock offerings made outside the United States. The proposed class included approximately 50,000 purchasers of whom

386 were American and the balance of whom were foreigners. *Id.* at 977–78 n.2. The Court first determined that federal securities laws did *not* reach losses from sales of securities to foreigners outside the United States because no acts occurred within the United States directly causing such losses, *see id.* at 986–90. Having dismissed these federal securities law claims for lack of subject matter jurisdiction, the Court then addressed whether the class might still be certified to include foreign purchasers with respect to their state law claims. The *Bersch* plaintiffs argued that there was pendent jurisdiction over their alleged common law fraud claims and that this would justify the inclusion of foreign purchasers in the proposed class. *Id.* at 993. The Second Circuit rejected this argument, calling it "ludicrous" to consider the state law claims of foreign purchasers pendent, and finding it would be an abuse of discretion for the district court to exercise pendent jurisdiction over the foreign purchasers' common law fraud claims. *Id.* at 996 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726–27 (1960)). The Court also articulated practical concerns, such as the introduction of complex choice-of-law issues, and the resultant necessity to look at the laws of at least fourteen other countries where sales were made, and the minimal domestic impact of a substantially foreign transaction, which together also weighed heavily against the exercise of pendent jurisdiction.

While not necessary to its finding of lack of jurisdiction, the Court noted that the management of a class including thousands of foreign purchasers could impose burdens on overtaxed district courts. In addition, and of critical importance to defendants' argument here, Judge Friendly also considered the likelihood of foreign recognition of any U.S. judgment that might be ultimately entered in the action: "Also, while an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a *near certainty*," because, as Judge

Frankel had observed in his district court decision certifying a class, "if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been." *Id.* (emphasis added).[11] In light of "uncontradicted affidavits that England, the Federal Republic of Germany, Switzerland, Italy, and France would not recognize a United States judgment in favor of the defendants as a bar to an action by its their own citizens" and an affidavit stating that several hundred individually brought claims were pending in Switzerland and that at least ninety had been settled, the Second Circuit directed the district court to exclude from the class action all foreign purchasers over whose claims—importantly—there was neither federal nor pendent jurisdiction. *Id.* at 996–97.

(b) The Progeny of Bersch

Since *Bersch*, and without the benefit of any further guidance from the Second Circuit, courts in this district and elsewhere have considered, in a somewhat haphazard way, the risk of nonrecognition by a foreign court as a factor relevant to whether, for purposes of satisfying Rule 23(b)(3), class treatment of foreign purchasers' claims is a superior method of adjudication.

Defendants point to three post-*Bersch* cases to support the exclusion of foreign purchasers from the proposed class here. In *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 459 (S.D.N.Y. 1989), Judge Mukasey denied class certification in a securities fraud action because the combination of (1) an uncontested affidavit stating that a British court "will not" recognize a foreign judgment in a U.S. opt-out class action, (2) a class size of only twenty-five members, and (3) atypical claims by the named plaintiff

[11] Judge Frankel's decision of June 28, 1972 was not reported, but it appears that despite his concern about claim preclusion he certified a class of all purchasers, foreign and domestic. *Id.* at 982.

together failed to satisfy the requirements of Rule 23. "[T]he combination of these problems," Judge Mukasey noted, "no one of which standing alone would necessarily require denial of class certification, virtually mandates the rejection of the class action form here." *Id.* at 460. While it is not clear what standard Judge Mukasey applied with respect to the claim preclusion issue, it would appear that he considered an uncontested affidavit stating to a certainty that a British court would not recognize a U.S. judgment insufficient on its own to deny class certification. Similarly in *Ansari v. New York University*, 179 F.R.D. 112 (S.D.N.Y. 1998), Judge Mukasey found that doubts regarding claim preclusion in foreign jurisdictions tipped the scales against an already weak motion for class certification. In *Ansari*, a dentist sued New York University, its college of dentistry, and various university officials, alleging breach of contract and violation of state statutes relating to an alleged failure to provide education services. The proposed plaintiff class included only thirty-five members, some of whom were foreigners, and failed to satisfy Rule 23(a)(1)'s numerosity requirement. *Id.* at 116. Second, though "not as significant as the failure to satisfy the numerosity requirement," class certification was denied because "limited case law . . . suggests" that at least six of the relevant foreign countries would not accord claim preclusion to an opt-out class action. *Id.* at 117. Judge Mukasey considered this fact "further evidence that class certification is inappropriate," though of course the decision could have rested entirely on plaintiffs' failure to establish numerosity. *Id.*

In *In re Daimler Chrysler AG Securities Litigation*, 216 F.R.D. 291 (D. Del. 2003), on which defendants also rely, plaintiffs asserted securities fraud claims against a German automobile manufacture based on false statements allegedly made in connection with the acquisition of an American automobile manufacturer. The court did not cite *Bersch* but did cite *Ansari* and *CL-Alexanders* for the proposition that class certification may be inappropriate where "obstacles"

exist due to the inclusion of foreign class members. *Id.* at 301. Finding "practical difficulties" in maintaining a class with foreign investors, and further that plaintiffs had not adequately addressed manageability and damage issues, the court limited the class to U.S. investors.

Reaching a different result in *Cromer Finance Limited v. Berger*, 205 F.R.D. 113 (S.D.N.Y. 2001), Judge Cote considered the res judicata effect of a class action judgment as "a factor that must be considered in evaluating the superiority of the class action device," but distinguished those cases "in which there is a 'possibility' that a foreign court may not recognize a judgment, and those in which there is 'near certainty' that it will not be recognized." *Id.* at 134–35 (citing *Bersch*, 519 F.2d at 996). Judge Cote concluded, upon review of the competing expert affidavits, that it was "at most a 'possibility'" that foreign courts would not recognize a U.S. judgment, and certified a class including foreign claimants alleging federal securities fraud against an operator of an offshore investment fund and Bermuda accounting firms. *Id.* at 135. Taking a different tack, Judge Sweet, in *In re Lloyd's American Trust Fund Litigation*, No. 96 Civ. 1262 (RWS), 1998 WL 50211, at *15 (S.D.N.Y. Feb. 6, 1998), read *Bersch* as applying only to whether a class action should proceed under principles of pendent jurisdiction, and emphasized that *Bersch* did not directly address the issue of superiority under 23(b)(3). Without applying the "near certainty" test, Judge Sweet concluded that "a foreign court may look to the results achieved here for guidance, thereby contributing to the superiority of the class action procedure," and certified the class. *Id.*; *see also In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 50 (S.D. Cal. 1975) (stating that defendant's "reliance upon *Bersch* is misplaced because *Bersch* does not preclude foreign nationals from membership in any class alleging violations of the federal securities acts simply because of res judicata problems" and noting that "[a]lthough the res judicata problem is one factor to consider . . . it should not be used to deny [class

certification] . . . especially when this Court otherwise has subject matter jurisdiction").

In *Frietsch v. Refco, Inc.*, 92 C. 6844, 1994 WL 10014 (N.D. Ill. Jan. 13, 1994), the district court for the Northern District of Illinois considered a motion to certify a class of investors in commodity pools, including a number of German putative class members. The plaintiffs alleged, *inter alia*, violations of Sections 10(b) and 12(2) of the Exchange Act. *Id.* at *1. There, as here, the defendants argued that the class action device failed under Rule 23(b)(3) because German law would not recognize a judgment in a U.S. class action. *Id.* at *11. In support of this argument, the defendants' German law expert stated that a judgment in defendants' favor would "'most likely' not be given res judicata effect." *Id.* By contrast, the plaintiffs' German law expert stated that the "issue of res judicata cannot be predicted with certainty because there are no precedents, and any decision by a German court would be fact specific." *Id.* Faced with dueling affidavits, the court concluded that the preclusion issue "remain[ed] an uncertainty that [would] not paralyze the court from making a ruling that will provide all parties with the most efficient tools available to litigate the claims in this case." *Id.* The *Freitsch* court distinguished *CL-Alexanders* and *Bersch*, because in those cases the record contained uncontradicted affidavits that persuaded the respective courts that foreign courts would certainly not afford res judicata effect to a U.S. judgment on behalf of a class. *Id.*

The foregoing cases, regardless of their ultimate outcome, reveal that res judicata concerns have been appropriately grafted onto the superiority inquiry. It does not appear, however, that res judicata concerns should be dispositive without either an evaluation of the likelihood of nonrecognition or a consideration of other factors which impact a determination of the superiority requirement. *Ansari*, 179 F.R.D. at 116 (res judicata is "one of the factors that must be considered."); *Cromer*, 205 F.R.D. at 134; *In re*

U.S. Fin. Sec. Litig., 69 F.R.D. at 49 ("[T]he issue of *res judicata* was *one* of several factors to be considered." (citing *Bersch*, 519 F.2d 974)). With regard to an evaluation of the risk of nonrecognition, the Court does not find the "near certainty" standard to be a particularly useful analytical tool. In *Bersch*, Judge Friendly found, based on unopposed affidavits that nonrecognition was almost certain; however, there is no indication that only this degree of certitude calls into question the superiority of a class action. Nor is it likely that only where nonrecognition is a "mere possibility" ought a court find superiority to be established. It seems more appropriate, instead, to evaluate the risk of nonrecognition along a continuum. Where plaintiffs are able to establish a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement. *See In re IPO Sec. Litig.*, 471 F.3d at 33 (placing burden on plaintiff not just to produce "some evidence" of compliance with Rule 23, but to show that its requirements are met). Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class. The closer the likelihood of non-recognition is to being a "near certainty," the more appropriate it is for the Court to deny certification of foreign claimants. With these principles in mind, the Court now turns to the parties' arguments with respect to the degree of risk of foreign nonrecognition in this case.

(c) Recognition in France

Both sides have submitted voluminous competing expert declarations on the question of whether foreign courts would grant preclusive effect to a United States judgment or

settlement in this action.[12] Because a vast majority of the foreign shareholders are French nationals, the Court will address first, and in greater detail, the likelihood of recognition by a French court.

As both parties agree, there is no bilateral (or multilateral) agreement between France and the United States governing the recognition and enforcement of judgments and jurisdictional decisions rendered by their respective courts. (*See* Mourre Decl. ¶ 19; Renard-Payen Decl. ¶ 12; Audit

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[12] The following citation conventions will be followed with respect to the parties' competing expert declarations. Declaration of Bernart Audit in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 27, 2005 ("Audit Decl."); Declaration of Guy Carcassonne in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 23, 2005 ("Carcassone Decl."); Declaration of Daniel Cohen in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Oct. 3, 2005 ("Cohen Decl."); Declaration of Gérard de Geouffre de la Pradelle in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 29, 2005 ("de la Pradelle Decl."); Declaration of Olivier Renard-Payen in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 27, 2005 ("Renard-Payen Decl."); Declaration of François Terré in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sept. 30, 2005 ("Terré Decl."); Joint Declaration of Daniel Cohen and Géraud de Geouffre de la Pradelle in Support of Vivendi Universal, S.A's Sur-Reply in Opposition to Plaintiffs' Substituted Motion for Class Certification, Feb. 3, 2006 ("Cohen/de la Pradelle Decl."); Declaration of Alexis Mourre in Support of Plaintiffs' Motion for Class Certification, Dec. 6, 2005 ("Mourre Decl."); Declaration of Hélène Gaudemet-Tallon in Support of Plaintiffs' Motion for Class Certification, Dec. 1, 2005 ("Gaudemet-Tallon Decl."); Declaration of Hans Smit in Support of Plaintiffs' Motion for Class Certification, Dec. 20, 2005 ("Smit Decl."); Supplemental Declaration of Alexis Mourre in Support of Plaintiffs' Motion for Class Certification, June 22, 2006 ("Mourre Suppl. Decl."); Joint Declaration of Bernard Audit, Guy Carcassonne, Daniel Cohen, Gérard de Geouffre de la Pradelle, and Olivier Renard-Payen Setting Forth Observations with Respect to the Supplemental Declaration of Alexis Mourre and the Decision of the *Cour de Cassation* in *Prieur v. De Montenach*, July 7, 2006 ("Defs.' Suppl. Decl.").

Decl. ¶ 13; de la Pradelle Decl. ¶ 15.) French law also does not follow the condition of reciprocity, whereby a foreign judgment may have effect in France only if the foreign jurisdiction gives effect to French decisions. (*See* Terré Decl. ¶ 14.) Thus the United States's rules for recognition of foreign judgments are not relevant, and French recognition of a United States judgment is determined with reference solely to French law. The issue of whether a United States class action judgment would be recognized and enforced in France has never been directly addressed by French courts. (*See* Mourre Decl. ¶ 17; de la Pradelle Decl. ¶ 35; Gaudemet-Tallon Decl. ¶ 26; Smit Decl. ¶ 91.) However, French decisional law does address in general terms the circumstances in which foreign judgments may be recognized. (*See* de la Pradelle Decl. ¶ 15.)

Under French case law, before a foreign decision may be enforced or recognized (i.e., given preclusive effect) in France, it must first be subjected to the "exequatur" procedure. (Terré Decl. ¶ 15; de la Pradelle Decl. ¶ 30; Mourre ¶ 154.) Exequatur proceedings are concerned with the enforceability of a foreign decision under French law, and not with the substance of the underlying dispute. (Terré Decl ¶ 16; Smit Decl. ¶ 56.) If exequatur is granted, the underlying judgment is not changed, but rather its content is incorporated into the exequatur judgment, which then receives enforceability and res judicata effect in France. (Terré Decl. ¶ 16; Mourre Decl. ¶¶ 154–56.) The competing expert declarations agree that the recognition and enforcement of foreign judgments (grant of exequatur) in France is primarily governed by the *Munzer* case, decided by France's highest court, the *Cour de cassation*, in 1964. (*See, e.g.*, Audit Decl. ¶¶ 14, 16; Mourre Decl. ¶ 20; de la Pradelle Decl. ¶ 17; Terré Decl. ¶ 19; Renard-Payen Decl. ¶ 13.) The conditions that must be met under *Munzer* in order to grant exequatur may be summarized as follows: (1) the foreign court must properly have jurisdiction under French law (the "jurisdictional prong"); (2) the foreign court must have

applied the appropriate law under French conflict-of-law principles (the "applicable-law prong"); (3) the decision must not contravene French concepts of international public policy (the "public policy prong"); and (4) the decision must not be a result of *fraude á la loi* (evasion of the law) or forum shopping (the "forum shopping prong"). (*See* Cohen/de la Pradelle Decl. ¶ 5.)

(i) Jurisdictional Prong

Whether this Court would be viewed as having properly asserted jurisdiction over the French defendants is governed by the *Cour de cassation* case of *Simitch v. Fairhurst* (Cass. 1e civ. Feb. 6, 1985) (*see* Defs.' Suppl. Decl. ¶ 3; Mourre Decl. ¶ 22; Smit Decl. ¶ 58). The *Simitch* test requires that, in order for a foreign court to have properly exercised its jurisdiction, the following requirements must be met: (1) the case must not fall within the exclusive jurisdiction of the French courts, (2) the circumstances of the case or judgment at issue must be linked in a "characterized manner" to the foreign court, and (3) the choice of the foreign court must not be fraudulent. (*See* Mourre Decl. ¶ 24; *see also* Defs.' Suppl. Decl. ¶ 3.) Defendants' initial submissions relied heavily on the proposition that French courts had exclusive jurisdiction over French defendants under Article 15 of the French Civil Code and that, absent waiver, French courts would never recognize a U.S. judgment entered against a French entity. That position is no longer tenable in light of the recent decision of the *Cour de cassation* in *Prieur v. Montenach* (Cass. 1e civ. May 23, 2006) holding that "Article 15 only provides for an optional jurisdiction of French courts."

The question then becomes whether there is a sufficient or "characterized link" to warrant the exercise of jurisdiction by a U.S. court. Plaintiffs' experts contend that in order to satisfy this requirement, a French court does not need to determine that the foreign court has jurisdiction according to French conflict-of-jurisdictions rules, but rather must find

that there were sufficient connections between the case and the foreign court such that its exercise of jurisdiction was not inappropriate. (Mourre Decl. ¶ 76.) Although there are no precise criteria to define what might constitute a "characterized link" (*id.* at ¶ 75), one of plaintiffs' experts, Professor Hans Smit, likens it to the American concept of subject matter jurisdiction. (Smit Decl. ¶ 58). This Court, of course, has determined that subject matter jurisdiction exists based on plaintiffs' allegations that a substantial number of Vivendi's securities were traded in the United States, that individual defendants allegedly moved to the United States to expand Vivendi's presence there, and that a number of the alleged fraudulent acts took place in the United States. (*See* Mourre Decl. ¶ 77.) Based on the foregoing, plaintiffs' experts conclude that the "characterized link" requirement is "easily met in this case" (*id.* at ¶ 78), and indeed, that "there can be no doubt" of that fact (Smit Decl. ¶ 58).

Defendants' experts, however, express no such sanguine view of the likelihood of the "characterized link" test being met. They are instead "firmly of the view that a French court would reject a U.S. Court's assertion of jurisdiction over those foreign/absent class members as improper." (Defs.' Suppl. Decl. ¶ 5.) Defendants' experts base this conclusion in large part on the circumstances underlying the *Cour de cassation*'s recognition of foreign jurisdiction in the above-mentioned *Prieur* case. There, the French court found that the exercise of jurisdiction by the Swiss courts was appropriate in an annulment proceeding where the husband and wife were both born in Switzerland, married in Switzerland under Swiss law, and established their marital residence in Switzerland. Although the husband was a French citizen, these "ties" to Switzerland, the French court concluded, justified referring the case to Swiss courts to rule on the annulment of the marriage. (*See* Mourre Suppl. Decl. Ex. A, at 3.) Defendants' experts contend that the *Prieur* case shows a French court will require a similar showing of substantial contacts between the parties and the foreign

jurisdiction before recognizing a "characterized link." (Defs.' Suppl. Decl. ¶¶ 8–9.) Unlike the parties in the *Prieur* case, the foreign shareholders in the putative class had no direct contacts with the United States, and did not purchase their Vivendi shares in the United States. (*Id.* at ¶ 10.) In addition, the foreign shareholders have not expressly indicated any desire to sue Vivendi—a French corporation with its headquarters in Paris—in the United States or to be included in the putative class here. (*Id.*)

The acknowledged difference in degree of the contacts between the parties and the foreign forum in *Prieur* and in the instant case, however, is not sufficient to persuade this Court that a French court would not find a sufficient characterized link between the alleged fraud in this action and the United States sufficient to support the Court's exercise of jurisdiction. Defendants' experts merely show that where the ties of a case to the foreign jurisdiction are so significant as to be considered near absolute, a characterized link is readily established. It does not follow that the connection between defendants' alleged fraudulent course of conduct, occurring in sufficient part in the United States to warrant a finding of subject matter jurisdiction under our laws, would be insufficient under the "characterized link" standard. The links between the parties and the foreign forum in *Prieur* tend more to establish the paradigmatic case than to illuminate what a French court would decide when faced with the potentially closer question presented here. Upon the record presented, where Vivendi's CEO and CFO moved their operations to the United States and, allegedly, continued their fraudulent scheme there, the Court concludes that a French court would likely find a "characterized link" sufficient to satisfy the second element of the *Simititch* test.

The final element of the *Simititch* test is that plaintiffs' choice of a United States court must not have been fraudulent. This requirement has two different elements. First, the foreign judgment must not have been "obtained

through deceitful maneuvers." (Mourre Decl. ¶ 79.) Defendants do not contest this element. Second, the case must not have been brought "in a foreign court in order to obtain a ruling from that foreign court, under foreign law that differs from the law to which a litigant would otherwise be subjected domestically." (Terré Decl. ¶ 45.) That is, plaintiff must not have manufactured jurisdiction in order to choose a more favorable forum when French law should have applied. Defendants argue that plaintiffs' U.S. action is "engineered" to evade a judgment under French law. In 2002, the "ADAM" association (protecting minority shareholders) along with certain Vivendi shareholders (designated by name) petitioned the Paris Commercial Court to investigate Vivendi during the basic class period. The court found the claim "ill-founded" and dismissed it. The ADAM chairwoman allegedly stated that the dismissal prompted her to introduce a class action in the United States on behalf of French shareholders. Thus, defendants argue, the U.S. action is an attempt to avoid the proper application of French law, and will preclude a grant of exequatur. (Terré Decl. ¶ 46; *see also* Cohen/de la Pradelle Decl. ¶ 21.)

As an initial matter, there is no evidence that the action pending before the Court was in fact brought at the instigation of the ADAM chairwoman. Furthermore, while plaintiffs in this case have clearly come before this Court in order to avail themselves of causes of action and procedural devices unavailable in France, it is by no means a certainty that this alleged forum shopping would form a bar to recognition. Indeed, it is difficult to see how plaintiffs in this case are operating a fraud on the court by bringing U.S. securities law claims that are, in part, based on activities in the United States, and which have been found to be within the Court's subject matter jurisdiction. The Court concludes, therefore, that a French court is unlikely to find that plaintiffs engaged in improper forum shopping in pursuing this action in the United States, and would conclude that the third

element of the *Simititch* test (and thereby the jurisdictional prong of *Munzer*) is satisfied.

(ii) Applicable-Law Prong

The applicable-law prong asks whether under French choice-of-law principles the application of U.S. law in this action is appropriate. Although French law recognizes that when a French company trades securities on foreign exchanges it is subject to the laws of those countries (*see* Mourre Decl. ¶ 139), the issue here is whether U.S. law was properly applied with respect to non-U.S. investors who did not purchase Vivendi securities on the NYSE. Neither party provides guidance on what recognized French choice-of-law principles in fact are, nor what rules of analysis are applied in determining whether, in the French view, the proper law has been applied.

Defendants' expert opinions are not uniform with respect to their analysis of the applicable-law prong. Two of defendants' experts believe that a French court would determine that the appropriate applicable law would be French law, because the defendants are French, much of the alleged wrongdoing occurred in France, and many of the relevant transactions were made by French investors in France. (*See* Terré Decl. ¶ 28; Audit Decl. ¶ 25.) However, Terré and Audit both acknowledge that the application of foreign law may be recognized as appropriate where the doctrine of "equivalence" applies. (*See* Terré Decl. ¶ 29; Audit Decl. ¶ 26.) Equivalence exists where the resolution of the matter under French law would have been the same as the one made under the foreign law at issue. (*See* Terré Decl. ¶ 29.) Both Terré and Audit argue that the application of U.S. law and French law in these circumstances would not be considered equivalent because of fundamental procedural differences, such as the opt-out mechanism and the

calculation of damages contemplated by Rule 23.[13] (*See* Terré Decl. ¶¶ 30–31; Audit Decl. ¶ 26.)

Defendants' experts Cohen and de la Pradelle take a slightly different view, though arriving at the same conclusion that a French court would not consider the applicable-law prong satisfied. Under French law, a company whose office is in French territory is subject to French law.[14] (*See* Cohen Decl. ¶ 18.) Cohen and de la Pradelle conclude that based on the foregoing provisions of French law, any judgment applying U.S. law to a case involving a French company would not be recognized. (*See* Cohen/de la Pradelle Decl. ¶ 15; *see also* Cohen Decl. ¶ 18.) These provisions standing alone, however, do not provide any basis for concluding that a company whose registered office is located on French territory may not, under certain circumstances, be subject to the laws of any other jurisdiction. In addition to these provisions of French law, Cohen and de la Pradelle rely on a 1997 decision by the *Cour de cassation*, *Société Africatours* (Cass. 1e civ. July 1, 1997). (*See* Cohen Decl. ¶ 20, Ex. 6.) A translation of the case was not provided but the entire summary provided by Cohen reads as follows:

> In [*Société Africatours*], the *Cour de cassation* set aside the decision of the Court of Appeal which had declared Senegalese law applicable to a company with its registered office in Senegal but had interpreted it from the point of view of French law which it had believed was similar: in doing so,

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[13] Notwithstanding the procedural differences, Terré concedes that substantively the claims in this action and in suits by two shareholders pending actions in France are undeniably similar. (Terré Decl. ¶ 31; see also Cohen Decl. ¶ 24 regarding similarity of causes of action alleged under French law.)

[14] "According to Article 1837 of the French Civil Code and Article L. 210-3 of the French Commercial Code 'companies whose registered office is located on French territory shall be subject to French law.'" (Cohen/de la Pradelle Decl. ¶ 15; Cohen Decl. Ex. 5.)

> it had falsely applied ordinarily applicable law and had misinterpreted it.

(Cohen Decl. ¶ 20.) Although Cohen and de la Pradelle assert that this case "specifically [rules] that if a company's registered office is located in France, then any legal action against that company brought by shareholders must be conducted according to French law" (Cohen/de la Pradelle Decl. ¶ 16), without more the conclusion simply does not follow from the described reasoning of the *Cour de cassation.*

As with the jurisdictional prong, plaintiffs' experts believe the applicable-law prong is easily met in this case: "[T]he requirement that the foreign court must have applied the law that governs according to French choice of law rule[s] is flexible and . . . it is sufficient if the law applied is substantively equivalent under French choice of law principles. That requirement appears amply met." (Smit Decl. ¶ 87.) More specifically, plaintiffs' expert Mourre argues first that the dominant view among French scholars is that the applicable-law prong should not be applied, and states that in fact the requirement is frequently not applied by courts. (Mourre Decl. ¶ 142.) Under this "dominant view" the proper inquiry asks only whether the foreign judge "seized" jurisdiction with the intent of avoiding the application of French law, or if the application of foreign law would constitute a violation of public policy. (*Id.*) Alternatively, Moure contends that the applicable-law may be met under the doctrine of equivalence, which accepts the application of a law other than that designated by French choice-of-law rules where the application of that foreign law leads to a result equivalent to the result that would have been reached under French law. (*Id.* at ¶ 146.) Considering the elements of plaintiffs' Section 10(b) claim, together with the fact that no punitive or other special or exemplary damages may be awarded in this action, Mourre concludes that the result in this action would be equivalent to that reached under

Article L. 465-2 of the *Code monétaire et financier*.[15] (*Id.* at ¶ 148.) This conclusion is supported indirectly by defendants' expert, Professor Cohen, who details at great length the substantive similarities of U.S. and French laws prohibiting the dissemination of false and misleading information to shareholders. (Cohen Decl. ¶¶ 27–43). Defendants' expert Audit opines that procedural differences between French and U.S. shareholder litigation code preclude a finding of equivalence, but he provides no basis for his views. (Audit Dec., ¶ 26). On balance, the Court concludes (a) that procedural differences are more properly the subject of a public policy analysis and (b) that the substantive similarities between U.S. and French law regarding securities fraud are likely sufficient under the doctrine of equivalence to meet the applicable-law prong of the *Munzer* test.

(iii) Public Policy Prong

This prong of the *Munzer* test requires that the foreign judgment to be recognized must be in "conformity with international public policy." (Audit Decl. Ex. 5.) This requirement is perhaps the most problematic of all the *Munzer* conditions inasmuch as French law does not recognize opt-out class actions. (Cohen Decl. ¶ 49–51; Mourre Decl. ¶¶ 102–05). The fact that opt-out class actions are not presently permitted is, of course, some indication that such actions are contrary to French public policy. However, the fact that a particular right is not recognized in France will only lead to nonrecognition of a foreign judgment where the judgment would "infringe principles of universal justice." *Lautour v. Guiraud* (Cass. 1e civ. May 25, 1948) (Mourre

[15] This provision "provides for the liability of any individual or entity who 'disseminates in the public, by any means, false or misleading information on the perspectives of evolution or on the situation of an issuer of securities whose securities are traded on a regulated stock exchange or on the perspectives of evolution of a financial instrument traded on a regulated market, in a manner that can influence the market value.'" (Mourre Decl. ¶ 148.)

Decl, Annex 27) ("[F]oreign rules . . . are not contrary to the French conception of international public policy merely because they differ from mandatory provisions of French law, but only insofar as they infringe principles of universal justice considered in French conception as having universal value.").)

Defendants contend that an opt-out class action offends such universal principles in three respects. First, it is an accepted principle of French law that no one may claim in court by proxy. This principle—in French, *nul ne plaide par procureur*—procedurally requires anyone acting as a plaintiff or defendant in a lawsuit to make his identity known individually in the legal proceedings. (*See* Terré Decl. ¶ 38.) As a result, defendants' argue, the fact that not all members of the putative class will be identified by name, but instead represented by court-appointed class representatives, will be fatal to recognition of a U.S. judgment in this case by a French court. (*See id.* at ¶ 39; Renard-Payen Decl. ¶ 15; de la Pradelle Decl. ¶¶ 40–43; Cohen/de la Pradelle ¶¶ 19–20.) Defendants further argue that the failure to identify each plaintiff individually contravenes French notions of due process. (Audit Decl. ¶ 30.) This is because of a "strong principle" of French law that no one should be a plaintiff without consenting affirmatively to do so. (Audit Decl. ¶ 31). Members of an opt-out class, of course, are not required to take any steps to be included in this class. Defendants also argue that the opt-out class is inconsistent with the fundamental principle of adversarial proceedings, *le principe du contradictoire*, which gives every litigant the "personal freedom" to appear and be heard during any proceeding affecting his rights. (Cohen/de la Pradelle Decl. ¶ 20; Audit Decl. ¶ 32) Particularly where individual notice is not required (as is permissible under Rule 23), a class member could be deprived of his fundamental right to appear without ever having received actual notice. (Cohen/de la Pradelle Decl. ¶ 20.) Finally, contingency fees are prohibited under French law because such fees reduce the amount of

compensation available to plaintiffs, and, therefore, a U.S. judgment which provided contingent fees "could likely be regarded" as a violation of French public policy. (Audit Decl. ¶ 34.)

Plaintiffs' experts reject the notion that U.S.-style class actions are incompatible with fundamental principles of justice as interpreted by the French courts. (Smit Decl. ¶¶ 85–90; Mourre Decl. ¶¶ 97–105.) Thus, Mourre points out that group actions may be instituted by trade unions on behalf of employees without individual consent, and that associations of copyright holders are permitted to act in court on behalf of the members of their group. (Mourre ¶¶ 99–101.) Furthermore, as one of defendants' own experts points out, shareholder associations have the right to sue companies and their directors, and to solicit a mandate from individual shareholders (using mail and public notice) to act on their behalf. (Cohen Decl. ¶¶ 45–48.) Though these procedures are surely distinguishable from a Rule 23(b)(3) opt-out class, they do not evince a fundamental hostility to the concept of collective actions.

Plaintiffs' experts further argue that defendants misinterpret and misapply the principle of *nul ne plaide par procureur*. In Mourre's view, the principle of *nul ne plaide par procureur* stands for the proposition that a party to a court proceeding cannot appear as acting in its own interest when in reality it exercises the rights of a third party whose identity is concealed. The purpose is to avoid procedural fraud so that a defendant knows about specific defenses. (Mourre Decl. ¶ 131; *see also* Smit Decl. ¶ 74 (opining that the rule is the French equivalent of the real party-in-interest requirement of Rule 17).) In this case, defendants know the plaintiffs represent the absent class members, who are the real parties bound together by Rule 23's requirement of commonality and typicality. (*See* Smit Decl. ¶ 74, Mourre Decl. ¶ 132.) Moreover, Mourre points to case law confirming that *nul ne plaide par procureur* is not part of the

French conception of international public policy and is not a basis to set aside a foreign judgment. (Mourre Decl. ¶¶ 133–34 (citing *Chenue v. Brachat* (Paris 5e. B, Oct. 24, 1991); Colmar, *Kruger v. Fougerolle* (Apr. 30, 1996); *Mandel v. Coprim* (Paris 1e. C, Oct. 27, 1998)).

Plaintiffs' experts acknowledge that French citizens have the right as "personal freedom" to appear and be heard in any action but contend, simply, that Rule 23(b)(3) honors such rights by providing every class members the opportunity to opt-out of the class. (Smit. Decl. ¶ 88; Mourre Decl. ¶¶ 109–10. Mourre also notes that collective actions by trade unions have been permitted by French courts on the equivalent of an opt-out basis, provided that member-employees are given notice of the action. (Mourre Decl. ¶ 99.) Thus it may well be that the French courts would enforce a U.S. class action judgment against a class member who received actual notice and, therefore, had a meaningful opportunity to exercise his "personal freedom," but decline to enforce the judgment against a class member who can show that he did not receive actual notice.

Weighing both parties detailed affidavits, the Court concludes that an opt-out class judgment would not offend French concepts of international public policy. While it is clear that such class actions are presently not permitted, it is equally clear that the ground is shifting quickly. Defendants' own expert, Professor Cohen, noted this development:

> French law does not cease to evolve in a direction favorable to *class actions*. Following the practice of the United States, the President of the French Republic seriously wished to develop collective actions and put in place a commission of study on April 13, 2005 responsible for the introduction of a sort of "class action" for relationships with consumers.

> Quite naturally the issue of the introduction into French law of "*securities class actions*" was raised in order to more effectively protect shareholders and investors. . . . The least that one can say is that this tendency is strongly gaining ground and that the evolution of French law seems very rapid. While not long ago one considered that they seemed far from French law, works are multiplying today to attempt to take the exact measure and to acclimate them in France. . . . French law is thus oriented toward "class actions" in matters of protection of shareholders and investors.

(Cohen Decl. ¶¶ 49–50.) Defendants are quick to point out that the study referred to by Professor Cohen observed that most of the study group's members viewed on opt-out class to be contrary to French law. (Cohen/de la Pradelle Decl. Ex. D at 32). On the other hand, a number of the members of the study recommended legislation establishing an opt-out class mechanism based on the U.S. and Quebecois models. (*See, e.g.*, *id.* Ex. D, Working Group Report, Comment by Jean-Guy Lévy, President of the Bar.) Of course, whether or when France adopts class action legislation and whether it includes an opt-out mechanism cannot be foretold. However, the expressed views of the French President, as well as the ongoing debate in legal and business sectors is strong evidence that the class action model is not so contrary to French public policy that its use would likely be deemed an infringement of "principles of universal justice" or contrary to "international public policy." Accordingly, the public policy prong of the *Munzer* test is likely satisfied.

(iv) Absence of Fraud

The final prong of the *Munzer* test – that the action before the foreign court was not fraudulent – has been addressed in the course of the Court's consideration of the

Simitch decision. *See discussion supra.* For the reasons stated above, it appears unlikely that a French court would find fraud or improper forum shopping in plaintiffs' pursuit in this Court of claims arising under the U.S. securities laws.

* * *

In sum, the Court concludes that plaintiffs' experts have shown a probability that French courts will find that (i) this Court has properly asserted jurisdiction over claims that have a "characterized link" to this jurisdiction; (2) U.S. securities laws satisfy the doctrine of equivalence and are appropriately applied; (3) a judgment herein will not infringe principles of universal justice; and (4) plaintiffs have not engaged in prohibited forum shopping. Accordingly, a judgment in this case would, more likely than not, be granted recognition at such time as an exequatur proceeding is instituted.

(d) Recognition in England

There is no clear authority addressing the res judicata effect of a U.S. class action judgment in England. As there is no statute or convention at play, the issue is addressed under common law rules. English common law provides for enforcement of a foreign judgment where the foreign court was "competent."[16] English authorities consistently discuss the competency of a foreign court in terms of whether there was jurisdiction over the *defendant.* Thus, a court is competent when (i) the defendant was present within its jurisdiction when proceedings were instituted, or (ii) the defendant submitted to its jurisdiction. (Declaration of Laurence Rabinowitz in Support of Vivendi Universal, S.A's

[16] The other elements generally required to establish *res judicata* are (i) that the judgement be final, (ii) that there is an identity of parties and (iii) that there is an identity of subject matter. (Rabinowitz Decl. ¶ 34 (citing *Good Challenger v. Navegante SA v. Metalexportimport SA* [2003] EWCA Civ. 1668).) The defendants do not argue that these elements would not be met.

Opposition to Plaintiffs' Motion for Class Certification, Sep. 29, 2005 ("Rabinowitz Decl."), ¶ 25.) By this standard, of course, this Court would be competent as Vivendi's extensive U.S. operations place it within the Court's jurisdiction.

Defendants contend, however, that if presented with the issue, English courts would also require that a U.S. court have personal jurisdiction over non-U.S. class members through their individual appearance in the action (Rabinowitz Decl. ¶ 26.) Some support for this position can be found in dicta in *Campos v. Kentucky & Indiana Terminal Railroad Company* [1962] 2 Lloyd's Rep. 459 (QB). Therein the court ruled in favor of defendant on the merits of the case but went on to note that defendant's alternative defense of res judicata with regard to a favorable U.S. class action judgment would likely fail because (i) the U.S. action was a "spurious" class action,[17] which did not bind absent parties even under U.S. law and (ii) in any event, plaintiff was not a class member at the initiation of the U.S. proceeding. Lastly, the court found "great force" in the argument that res judicata would not operate in an English court against a party who has not been served with process in the foreign proceeding. This begs the question of whether a class member is a party. Thus, it is far from clear how the court's observation—accurate as far as it goes—would have been applied in the case of a "true" Rule 23(b)(3) class wherein absent class members are not parties for a variety of procedural purposes, including service of process. Conte & Newberg, *supra*, § 1.4 n.2. Defendants' expert simply ignores the issue and assumes, without analysis, that absent members are subject to the same English common law jurisdictional rules that, as noted, refer only to the need for service upon, or an appearance by, individual

[17] "[S]purious class action was little more than a permissive joinder device, which would be binding only on the original parties to the suit and those who might subsequently intervene." 1 Conte & Newberg, *supra*, § 1:9.

party defendants. While English courts are not bound thereby, the Supreme Court has explicitly rejected this reasoning, holding that non-resident class members need not appear individually, and that adequate notice with an opportunity to opt-out is sufficient to establish a limited consent to jurisdiction. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806-14 (1984). In addition, the inference that an English court would not find a U.S. court competent where non-resident class members had not personally been served, appears inconsistent with English law governing class or "representative" actions which, in fact, allows absent parties to be bound. Rule 19.6 of the 1998 Civil Procedure Rules provides as follows:

> (1) Where more than one person has the same interest in a claim –
>
> a. the claim may be begun; or
>
> b. the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.
>
> (2) The court may direct that a person may not act as a representative.
>
> (3) Any party may apply to the court for an order under paragraph (2).
>
> (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –
>
> a. Is binding on all persons represented in this claim; but
>
> b. may only be enforced by or against a person who is not a party to the claim with the permission of the court.

(Harris Decl. ¶ 44.) Thus, English representative actions will bind those on whose behalf a claim is brought (and, under section 4(b), persons who are not parties to the claim with the

court's permission). *See generally* Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 Duke J. Comp. & Int'l L. 249 (2001). There is no requirement, express or implied, that class members, foreign or domestic, must appear or be served in order to be bound. It is true that the scope of representative actions relating to claims for damages is considerably narrower in England than in the United States and that it is unlikely that the present action could proceed as a representative action in England. (Declaration of Jonathan Harris in Support of Plaintiffs' Motion for Class Certification, Dec. 8, 2005, ¶ 45.)[18] However, this appears to be more of a procedural distinction than a jurisdictional one, the point being that English law recognizes the competency of its own courts to bind absent parties in appropriate situations. While the issue is hardly free from doubt, based on the affidavits before it, the Court concludes that English courts, when ultimately presented with the issue, are more likely than not to find that U.S. courts are competent to adjudicate with finality the claims of absent class members and, therefore, would recognize a judgment or settlement in this action. (Harris Decl. ¶¶ 14–20 and 50–51 (citing John C. L. Dixon, *The* Res Judicata *Effect In England of a US Class Action Settlement*, 46 Int'l & Comp. L.Q. 134, 145–50 (1997)).)[19]

(e) Recognition in Germany

Whether a foreign judgment would be recognized in Germany is a matter of German procedural law. Plaintiffs' expert, Dr. Peter Mankowski, and defendants' expert, Dr. Gerhard Herman Otto Wegen, agree that there is no decision

[18] But defendants' expert notes that "an English court might even entertain a class (or representative) action against Vivendi. Such a procedure is permitted by CPR Rule 19.6 . . ." (Rabinowitz Decl. ¶ 23.)

[19] As in France, English courts will not recognize foreign judgments that are contrary to "principles of natural justice." Dixon, *supra*, at 148. Significantly, Defendants' expert does not contest this point. (*See generally* Rabinowitz Decl.)

by a German court as to whether a judgment in a U.S. class action would be recognized under the German Code of Civil Procedure (Zivilprozessordnung) ("ZPO"). (Declaration of Peter Mankowski in Support of Plaintiffs' Motion for Class Cerification, Dec. 12, 2005 ("Mankowski Decl."), ¶ 8; Declaration of Gerhard Hermann Otto Wegan in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Sep. 27, 2005 ("Wegan Decl."), ¶¶ 7–8.) Section 328 of the ZPO provides for the recognition of foreign judgments if five conditions are met:

> (1) if the foreign court was competent for deciding on the claims based on the German provisions on jurisdiction, (2) if the defendant was properly served (in the legal relationships of the United States and Germany according to the Hague Service Convention) in a timely manner enabling defendant to defend itself properly, (3) if the judgment is not inconsistent with an earlier German or foreign judgment which would be itself recognised in Germany, (4) if the contents of the judgment do not infringe the German *ordre public*, i.e. the indispensable provisions of German law and (5) if reciprocity is guaranteed, i.e. if the foreign court would recognise a corresponding German judgment.

(Wegen Decl. ¶ 7.) Defendants' expert does not question the satisfaction of the first, second, third and fifth conditions.

Dr. Wegen contends, however, that a U.S. class action judgment would violate the "ordre public." (Wegen Decl. ¶ 7.) The constitutional premise for this position is found in Article 103 of the German Constitution which establishes the right of a citizen to be heard and to participate in legal proceedings. (Wegen Decl. ¶ 9; Mankowski Decl. ¶ 36.) This right, in the nature of a due process protection, is referred to as the right of "correct representation," (Wegen Decl. ¶ 10),

or the "disposition maxim," (Mankowski Decl. ¶ 39). Interestingly, Dr. Wegen appears to conclude that the right of correct representation could be satisfied, and a U.S. judgment would be enforced as to absent class members, provided they were to receive actual notice of the class action and had the opportunity to opt-out. (Wegen Decl. ¶ 12.) However, according to Dr. Wegen, service of notice must be made "in a manner that strictly complies with the requirements of the Hague Service Convention."[20] (Wegen Decl. ¶ 17.)

It is true that service of process in conformity with the Hague Service Convention would require individual service through the German Central Authority and local German courts. (Wegen Decl. ¶¶ 13–14.) But service of process in this context refers to the formal delivery of an initial pleading to an *opposing* party, i.e., the defendant. It cannot readily be thought of as a means of providing notice by plaintiff to a member of the plaintiff class. (Mankowski Decl. ¶¶ 49–54.) By analogy, in the U.S. context, it makes little sense to evaluate a class member's due process right to adequate notice in terms of whether the service requirements of Rule 4 of the Federal Rules of Civil Procedure have been satisfied.

Plaintiffs, then, appear to have the better of the argument that compliance with the due process requirements of the German constitution could be satisfied by measures reasonably calculated to give actual notice to class members of their right to opt-out of a U.S. class action and pursue, or decline to pursue, their individual claims. But even under Dr. Mankowski's analysis, it would seem that a U.S. judgment would not be enforced against a class member who did not in fact receive actual notice despite plaintiffs' efforts to broadly disseminate notice.

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[20] Under German law, German nationals can only be served by foreign claimants in conformity with the provisions of the Hague Service Convention.

There is a further concern regarding enforceability of a class action judgment that is not directly addressed by defendants' expert. Leaving aside the question of whether the Hague Service Convention is the exclusive means for notifying absent class members, can it be said that the use of a collective action is so contrary to German public policy that a U.S. class action judgment will not be recognized under any circumstance? In this regard the Court notes that, in contrast to France and England, collective actions remain unknown in Germany. Germany has recently passed the Investor Protection Model Procedure Act which addresses multiple suits by shareholders that allege violations of the capital market laws. (Mankowski Decl. ¶¶ 32–33.) This act provides for the use of test cases whose outcome would be binding in other individual shareholder actions. (*Id.*) However, it is not a collective action in the sense that non-party shareholders are bound by the results. By comparison, both France and England, albeit in limited circumstances, recognize collective actions in which the interests of non-parties are pursued and non-parties are bound by the results. *See discussion supra.* Taking the parties' expert affidavits as a whole, the Court is left with the distinct impression that the formalities of German law may well preclude the recognition of a judgment in the instant case. Indeed, plaintiffs' expert concludes only that "one cannot rule out a U.S. class action settlement or judgment . . . will be recognized or enforced in German." This candid opinion is insufficient on its face and leads the Court to conclude that plaintiffs have not shown a probability that German courts will give res judicata effect to a judgment in this case.

(f) Recognition in Austria

With respect to Austrian law, the parties' experts agree that under the current applicable law, there must be "formal reciprocity" between the foreign state and the Republic of Austria as a condition to recognition of a foreign judgment. (Declaration of Christian Herbst in Support of Vivendi

Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Oct. 1, 2005 ("Herbst Decl."), ¶ 34; Declaration of Leopold Specht in Support of Plaintiffs' Motion for Class Certification, May 12, 2005 ("Specht Decl."), ¶ 23.) Formal reciprocity may be established by a treaty to which the foreign state and the Republic of Austria are a party, or a duly published Austrian decree that states the existence of reciprocity. (Herbst Decl. ¶ 34; Specht Decl. ¶ 23.) The United States and Austria are not party to a reciprocity treaty, nor has an Austrian decree been published that would provided for the enforcement of a U.S. judgment. (Herbst Decl. ¶ 35.) Plaintiffs' expert, in response, provides only the opinions of various Austrian legal scholars that the Austrian law establishing these requirements is unconstitutional. (Specht Decl. ¶¶ 23–24.) These opinions fall far short of establishing a probability that an Austrian court would grant preclusive effect to any judgment or settlement issuing from this action.

(g) Recognition in The Netherlands

Plaintiffs have submitted the opinion of Professor Smit that Dutch courts would give binding effect to a judgment in, or settlement of a U.S. class action. As is true in other European jurisdictions, a shareholder class action does not appear to be available in the Netherlands. (Smit Decl. ¶ 46). Nevertheless, the Dutch Legislature has recently enacted class action legislation in other contexts indicating that recognition of a judgment in this case would not be contrary to fundamental principles of fairness in Dutch law (*Id.* ¶¶ 36–39.) Defendants have offered no evidence to dispute the Smit Declaration. Based on the record before it, the Court finds plaintiffs have shown a probability that Dutch courts would recognize a judgment or settlement in this action.

(h) The Risk of Nonrecognition Does Not Compel Exclusion of All Foreign Class Members

Having considered the arguments presented by both sides on the risk of nonrecognition of a U.S. judgment or settlement abroad, the Court concludes that such concerns, without more, do not warrant exclusion of the citizens of France, England, and the Netherlands, who are otherwise putative members of the proposed class. If and when the issue is presented to these countries, it is more likely than not that the courts in these countries would recognize the enforceability of a judgment or settlement in the present case.

However, it is more likely than not that German and Austrian courts, at present, will not give res judicata effect to judgments or settlements in a U.S. opt-out class action. Because lawsuits could be brought by Austrian and German nationals against defendants alleging the same wrongdoing that underlies the allegations in this case, the Court concludes that the adjudication of German and Austrian shareholders' claims in this class action is not necessarily superior. The likelihood of nonrecognition in Germany and Austria raise weightier issues of fairness and lessen, albeit in limited realistic situations, the promise of economy, consistency, and finality made possible when class members are bound to a final judgment or settlement. *See* Fed. R. Civ. P. 23(b)(3)(C); *see also* 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1780 (3d ed. 2005) (noting that Rule 23(b)(3)(C) requires, *inter alia*, a court to "evaluate whether allowing a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results"); Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 130 (2003) ("[The American class action] serves the interests of economy by not having to try the same issues again and again in separate cases. It also serves the interests of consistency and finality by avoiding

the possibility of inconsistent outcomes in separate trials of similar cases and resolving all claims in a single case that is binding on all class members.").

A countervailing concern, however, is that in a global economy, companies do business across international borders and sell their securities worldwide, and acts of corporate misconduct—whether committed in the United States, abroad, or both—may have substantial effects on the United States market. Where, as here, the Court has determined that significant alleged conduct occurred in the United States warranting application of the federal securities laws to foreign actors, *see In re Vivendi*, 381 F. Supp. 2d at 169, the United States has a strong interest in the enforcement of those laws where applicable. *Cf. Dirienzo v. Philip Servs. Corp.*, 294 F.3d 21, 32 (2d Cir. 2002) (rejecting defendant's *forum non conveniens* arguments in part because of United States' interest in enforcing its securities laws, and also noting that "[f]or securities markets to function efficiently, securities fraud law must be clear and enforceable"); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull, S.A.*, 606 F.2d 5, 9 (2d Cir. 1979) ("Congress did not intend 'to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when they are peddled only to foreigners.'" (quoting *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975))); Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563, 1569 (2005) (arguing in favor of "default presumption in favor of including foreign claimants in small claim securities, class actions law suits," because to do otherwise would lessen the deterrent effect of class adjudication).

Furthermore, in considering whether the threat of nonrecognition defeats the superiority of the proposed class, the Court should not ignore practical realities that reduce the

risk that defendants would in fact be prejudiced by any potential nonrecognition in the form of duplication of effort or inconsistent results. *See Cromer*, 205 F.R.D. at 135 n.32;[21] *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. at 48 (noting "that practical difficulties in each country make lawsuits by these [foreign plaintiffs] virtually impossible"); *see also* Buschkin, *supra*, at 1597. In this sense, defendants' res judicata concerns are "more hypothetical than real," since the likelihood of relitigation by absent class members in a European forum is low. (Pls.' Reply Mem. 11.) As plaintiffs' expert points out, absent class members who were dissatisfied with an adverse judgment, would be pressing claims (1) already adjudicated against them, (2) without the benefit of contingency fee arrangements, (3) with the added risks of having to pay defendants' counsel fees and costs of litigation. Further, such plaintiffs would be facing the risk that defendants would be able to successfully invoke this Court's jurisdiction to prevent recovery. (*See* Smit Decl. ¶ 105) Similar disincentives would apply to absent class

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[21] The contingencies that would have to be met before genuine *res judicata* concerns might arise in the context of a judgment were described as follows:

> "[M]any events would have to occur before [defendant] would be prejudiced by an inability to assert the defense of res judicata successfully. Specifically, (1) the class action would have to be tried to judgment, despite the greater likelihood that the case would instead be settled; (2) the class would have to lose on the merits; (3) an absent class member would have to bring a subsequent lawsuit in [a foreign] court, despite such practical deterrents as the unavailability of contingent-fee representation or a class action vehicle in those courts; (4) the absent class member would have to succeed in establishing jurisdiction over the defendants in that foreign court; (5) the foreign class member would have to convince the foreign court to ignore this Court's ruling and render judgment in its favor on the merits; and (6) the absent class member would have to then convince a Bermuda court to enforce the foreign judgment and ignore the judgment rendered by this Court."

Cromer, 205 F.R.D. at 135 n.32.

members dissatisfied with a favorable judgment they deemed inadequate. (*Id.*) And in the case of a settlement, the Court can fashion a proof-of-claim mechanism intended to bind all participants and discourage relitigation. *See Cromer*, 205 F.R.D. at 135. While it could be argued that practical considerations weigh strongly in favor of allowing all foreign purchasers to participate in plaintiffs' proposed class, the Court elects to proceed with caution and limit the class to foreign shareholders whose courts, in the unlikely event of successive litigations, are likely to give *res judicata* effect to any judgment herein. This double layer of security should allay defendants' legitimate concerns, and argues in favor of including French, British and Dutch shareholders in the proposed class.

3. Manageability

In determining whether a class action is a superior method of adjudication for a particular action, courts must also consider the management difficulties likely to be encountered if the action is continued as a class suit, such as the burden of complying with Rule 23's notice requirements. *See* 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1780, at 187–90. The determination of whether a particular action is manageable is "peculiarly" within the discretion of the district court. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2001).

Rule 23(c)(2) requires that "notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class." Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, 28 U.S.C.A. Rule 23, at 388. Rule 23(c)(2) states that the required notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be

identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Further,

> [t]he notice must concisely and clearly state in plain, easily understood language: the nature of the action, the definition of the class certified, the class claims, issues or defenses, that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under Rule 23(c)(3).

Id. Defendants argue that because Vivendi does not keep, does not have access to, and does not have the right to access information that would enable individual notice to shareholders carrying "bearer shares," individual notice would only be possible to a small number of European class members holding "registered shares." (*See* Bisiaux Decl. ¶ 9; Heiser Decl. ¶¶ 13, 23.) Publication notice in a number of foreign countries and in a variety of foreign languages, defendants' argue, would be unmanageable and insufficient to comport with due process.

While individual notice, where reasonably possible, is required, when class members' names and addresses may not be ascertained by reasonable effort, publication notice has been deemed adequate to satisfy due process. *See Eisen*, 417 U.S. at 173 (requiring individual notice to all class members whose names and addresses may be ascertained through reasonable effort); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (finding notice by publication constitutionally sufficient as to trust beneficiaries whose names and addresses are unknown). As long as the Court is persuaded that "class counsel acted reasonably in selecting means likely to inform persons affected," notice will be

considered adequate. *Denney v. Jenkins & Gilchrist*, No. 02 Civ. 5460, 2005 WL 388562, at *20 (S.D.N.Y. Feb. 18, 2005); *see also In re Western Union Money Transfer Litig.*, No. 01 Civ. 0335 (CPS), 2004 WL 3079932, at *5 (E.D.N.Y. Oct. 19, 2004) (finding, in case involving class partially comprised of foreign class members, that individual notice must be sent to all class members identifiable in defendant's computer database, and requiring publication notice including, *inter alia*, "media outreach in the form of a press release, video news release, and radio news release, to be translated into various foreign languages and distributed internationally"); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) (describing notice of settlement to foreign class members as including direct mail notice to ascertainable members, and publication notice including, *inter alia*, a widespread notice campaign in foreign newspapers, promotional announcements in key foreign cities.); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 144 (E.D.N.Y. 2000) (approving multi-faceted notice plan involving direct mail, worldwide publication, public relations, Internet and grass roots community outreach in light of inability to send notice exclusively by direct mail). Indeed, in a recent class action settlement including global purchasers of Royal Ahold N.V. American Depository Receipts and/or ordinary shares, the United States District Court for the District of Maryland found that notice including direct mailings to all reasonably identifiable persons and entities, posting of documents on websites, and publication of notice in numerous different countries and different languages "fully satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process." *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 437 F. Supp. 2d 467, 472 (D. Md. 2006).

In response to defendants' manageability concerns, plaintiffs have filed a comprehensive affidavit outlining the effectiveness of its proposed method of providing notice in foreign countries. (*See* Affidavit of Todd B. Hilsee on Ability

to Provide Multi-National Notice to Class Members, Dec. 19, 2005 ("Hilsee Aff.") ¶ 7.) According to this affidavit, the following methods of notification will be used to execute the dissemination of notice required under Rule 23(c)(2): (1) individual mailed notice to all reasonably identifiable class members; (2) publication notice in appropriate multi-national media to reach, in combination with direct mailings, a high percentage of the shareholders in each country; (3) a neutral informational press release, to be approved by the Court in advance, announcing the commencement of the notice program to increase awareness; (4) notice through any shareholder communication channel that might exist, including Vivendi's website; and (5) a neutral website, to be approved by the Court in advance, translated into all relevant language, posting the notices, the plaintiffs' complaint, defendants' answers, the class certification order; an exclusion request form, and other relevant documents. (*Id.* ¶ 11.) Although the issue of executing appropriate notice will necessarily be revisited, for purposes of considering plaintiffs' motion to certify a class the Court is satisfied that plaintiffs intend to provide individual notice to those class members whose names and addresses are ascertainable, and that plaintiffs' proposed form of publication notice, while complex, will prove both manageable and the best means practicable of providing notice.[22] At this stage, "the issue of foreign notice is not sufficiently grave to defeat class certification." *In re Lloyd's*, 1998 WL 50211, at *16; *cf. In re*

[22] Defendants' contention that providing notice to foreign class members is unmanageable is further undercut by the recent approval by Judge P. Kevin Castel of a comprehensive program to provide notice to eligible claimants of money received from the settlement between the Securities Exchange Commission and Vivendi, Messier and Hannezo for the violation of securities laws. *See SEC v. Vivendi Universal, S.A.*, No. 03 Civ. 10195 (PKC) (S.D.N.Y. Dec. 18, 2006). The notice plan was in many respects similar to the one proposed by Hilsee in this proceeding. While that decision is of court not binding on the Court, it suggests that it is realistic to provide notice to foreign class members involved in this very case.

DaimlerChrysler, 215 F.R.D. at 301 (noting difficulties involved in maintaining class including foreign investors, and observing that lead plaintiffs had not adequately responded to defendants' concerns relating to class management).

IV. Subclasses

Defendants argue that there is no single integrated worldwide market for Vivendi ordinary shares and Vivendi ADSs and, therefore, that a single class consisting of holders of both securities cannot be certified. (Opp'n 4–6). Implicit in their argument is the contention that if plaintiffs' motion for certification is granted, separate subclasses should be established for purchasers of ADSs and for purchasers of ordinary shares. The Court has the authority under Rule 23(c)(4)(B) of the Federal Rules of Civil Procedure to divide a class into subclasses. The existence of divergent interests is the primary reason to establish subclasses. *See* 1 Conte & Newberg, *supra*, § 8:12. Defendants argue that a single class cannot be certified because American and European stock markets are not fully integrated and, therefore, each group of purchasers will require separate proof on the issues of reliance and damages. (Defs.' Sur-Reply Mem. 8-9). According to defendants' expert, Professor Gompers, there are two district trading markets because (1) U.S.-based investors faced a foreign exchange risk not faced by foreign investors; and (2) investors in each security followed different trading strategies and had different trading opportunities because of the time zone difference between the markets. (Declaration of Paul A. Gompers in Support of Vivendi Universal, S.A's Opposition to Plaintiffs' Motion for Class Certification, Oct. 3, 2005, ¶ 6.) The lack of full integration is evidenced by market metrics that show segmentation and an alleged market lag with news being incorporated into the price of ordinary shares on the Paris Bourse before impacting the price of ADSs on the NYSE. (*Id.* ¶¶ 40–44.) Plaintiffs present their own expert, Jane D.

Nettesheim, who opines that the markets for Vivendi ordinary shares and ADSs are "highly integrated," although concededly not "perfectly integrated." (Declaration of Jane D. Nettesheim in Support of Plaintiffs' Motion for Class Certification, Dec. 19, 2005, ¶ 7.) Analyzing the relative prices of each security during the period where both markets are trading, Nettesheim finds that prices were "almost always effectively equivalent." (*Id.* ¶ 8 & Exs. 4, 5.) While the NYSE and the Bourse may not be perfectly integrated, such that Vivendi ordinary shares and ADSs are perfect substitutes with identical prices and returns, this distinction does not require creation of subclasses. It is undisputed that the two markets are highly integrated and nothing in defendants' submission supports the proposition that such minor inefficiencies between the markets that may exist will have any impact on class-wide proof of the element of reliance. And small differences in returns experienced by holders of ADSs and ordinary shares may affect the amount of damage but are unlikely to alter the methodologies of calculation, at least to a degree necessary to warrant, at this juncture, the creation of subclasses.

CONCLUSION

Consistent with the foregoing, plaintiffs' motion to certify the class [234] is GRANTED in part. A class is hereby certified consisting of all persons from the United States, France, England, and the Netherlands who purchased or otherwise acquired ordinary shares or American Depository Shares of Vivendi Universal, S.A. between October 20, 2000 and August 14, 2002.

SO ORDERED.

Dated: New York, New York
March 22, 2007

/s/ Richard J. Holwell
Richard J. Holwell
United States District Judge

APPENDIX D

RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND ADVISORY COMMITTEE NOTES ACCOMPANYING THE 1966 AMENDMENTS TO RULE 23

Federal Rules of Civil Procedure

IV. PARTIES > Rule 23.

Rule 23. Class Actions

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making

appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1) (A) When a person sues or is sued as a representative of a class, the court must Â— at an early practicable time Â— determine by order whether to certify the action as a class action..

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2) (A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable

under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions.

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a

statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) (A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals.

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,

- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

- counsel's knowledge of the applicable law, and

- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award.

In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees.

A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion.

A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings.

The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge.

The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Notes of Advisory Committee on 1966 Amendments to Rule 23

Difficulties with the original rule.

The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo LJ 551, 570--76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, Some Problems of Equity, 245--46, 256--57 (1950); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U of Chi L Rev 684, 707 & n 73 (1941); Keeffe, Levy & Donovan, Lee Defeats Ben Hur, 33 Corn LQ 327, 329--36 (1948); Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv L Rev 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., Gullo v Veterans' Coop. H. Assn. 13 FRD 11 (DDC 1952); Shipley v Pittsburgh & L.E.R. Co. 70 F Supp 870 (WD Pa 1947); Deckert v Independence Shares Corp. 27 F Supp 763 (ED Pa 1939), revd, 108 F2d 51 (3d Cir 1939),

revd 311 US 282, 85 L Ed 189, 61 S Ct 229 (1940), on remand, 39 F Supp 592 (ED Pa 1941), revd sub nom Pennsylvania Co. for Ins. on Lives v Deckert, 123 F2d 979 (3d Cir 1941) (see Chafee, supra, at 264--65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., System Federation No. 91 v Reed, 180 F2d 991 (6th Cir 1950); Wilson v City of Paducah, 100 F Supp 116 (WD Ky 1951); Citizens Banking Co. v Monticello State Bank, 143 F2d 261 (8th Cir 1944); Redmond v Commerce Trust Co. 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L ed 620, 65 S Ct 188 (1944); United States v American Optical Co. 97 F Supp 66 (ND Ill 1951); National Hairdressers' & C. Assn. v Philad Co. 34 F Supp 264 (D Del 1940), 41 F Supp 701 (D Del 1940), affd mem, 129 F2d 1020 (3d Cir 1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., Knapp v Bankers Sec. Corp. 17 FRD 245 (ED Pa 1954), affd 230 F2d 717 (3d Cir 1956); Giesecke v Denver Tramway Corp. 81 F Supp 957 (D Del 1949); York v Guaranty Trust Co. 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231, reh den 326 US 806, 90 L Ed 491, 66 S Ct 7 (1945) (see Chafee, supra, at 208); cf. Webster Eisenlohr, Inc. v Kalodner, 145 F2d 316, 320 (3d Cir 1944), cert den 325 US 867, 89 L Ed 1986, 65 S Ct 1404 (1945). But cf. the early decisions, Duke of Bedford v Ellis, [1901] AC 1; Sheffield Waterworks v Yeomans, LR 2 Ch App 8 (1866); Brown v Vermuden, 1 Ch Cas 272, 22 Eng Rep 796 (1866).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a

"class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's Federal Practice, pars 23.10 [1], 23.12 (2d ed 1963). These results were attained in some instances but not in others. On the statute of limitations, see Union Carbide & Carbon Corp. v Nisley, 300 F2d 561 (10th Cir 1961), pet cert dism 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); but cf. P. W. Husserl, Inc. v Newman, 25 FRD 264 (SD NY 1960); Athas v Day, 161 F Supp 916 (D Colo 1958). On ancillary intervention, see Amen v Black, 234 F2d 12 (10th Cir 1956), cert granted 352 US 888, 1 L Ed 2d 84, 77 S Ct 127 (1956), dism on stip 355 US 600, 2 L Ed 2d 523, 78 S Ct 530 (1958); but cf. Wagner v Kemper, 13 FRD 128 (WD Mo 1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230--31; Keeffe, Levy & Donovan, supra; Developments in the Law, supra, 71 Harv L Rev at 937--38; Note, Binding Effect of Class Actions, 67 Harv L Rev 1059, 1062--65 (1954); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum L Rev 818, 833--36 (1946); Mich Gen Court R 208.4 (effective Jan. 1, 1963); Idaho R Civ P 23 (d); Minn R Civ P 23.04; N Dak R Civ P 23(d).

The amend[illegible] rule describes in more practical terms the occasions [illegible] maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a)

states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L Rev 433, 458--59 (1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 562, at 265, § 572, at 351--52 (Wright ed 1961). These are necessary but not sufficient conditions for a class action. See, e.g., Giordano v Radio Corp. of Am. 183 F2d 558, 560 (3d Cir 1950); Zachman v Erwin, 186 F Supp 681 (SD Tex 1959); Baim & Blank, Inc. v Warren-Connelly Co., Inc. 19 FRD 108 (SD NY 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1).

The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, Indispensable Party: The Historical Origin of a Procedural

Phantom, 61 Colum L Rev 1254, 1259--60 (1961); cf. 3 Moore, supra, par 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, Pleading and Procedure: State and Federal 719 (1962); see Supreme Tribe of Ben-Hur v Cauble, 255 US 356, 366--67, 65 L Ed 673, 41 S Ct 338 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See Maricopa County Mun. Water Con. Dist. v Looney, 219 F2d 529 (9th Cir 1955); Rank v Krug, 142 F Supp 1, 154--59 (SD Calif 1956), on app, State of California v Rank, 293 F2d 340, 348 (9th Cir 1961); Gart v Cole, 263 F2d 244 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959); cf. Martinez v Maverick Cty. Water Con. & Imp. Dist., 219 F2d 666 (5th Cir 1955); 3 Moore, supra, par 23.11 [2], at 3458--59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See Supreme Tribe of Ben-Hur v Cauble, 255 US 356, 65 L Ed 673, 41 S Ct 338 (1921); Waybright v Columbian Mut. Life Ins. Co., 30 F Supp 885 (WD Tenn 1939); cf. Smith v Swormstedt, 16 How 288, 14 L Ed 942 (US, 1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See Knapp v Bankers Securities Corp., 17 FRD 245 (ED Pa 1954), affd, 230 F2d 717 (3d Cir 1956); Giesecke v Denver Tramway Corp., 81 F Supp 957 (D Del 1949); Zahn v Transamerica Corp., 162 F2d 36 (3d Cir 1947); Speed v Transamerica Corp., 100 F Supp 461 (D Del 1951); Sobel v Whittier Corp., 95 F Supp 643 (ED Mich 1951), app dism, 195 F2d 361 (6th Cir 1952); Goldberg v Whittier Corp., 111 F Supp 382 (ED Mich 1953); Dann v Studebaker-Packard Corp., 288 F2d 201 (6th Cir 1961); Edgerton v Armour & Co., 94 F Supp 549 (SD Calg v Chicago T. & T. Co., 128 F2d 245 (7th Cir 1942); Citizens Banking Co. v Monticello State Bank, 143 F2d 261 (8th Cir 1944); Redmond v Commerce Trust Co., 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L Ed 620, 65 S Ct 187 (1944); cf. York v

Guaranty Trust Co., 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. Dickinson v Burnham, 197 F2d 973 (2d Cir 1952), cert den 344 US 875, 97 L Ed 678, 73 S Ct 169 (1952); 3 Moore, supra, at par 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See Heffernan v Bennett & Armour, 110 Cal App 2d 564, 243 P2d 846 (1952); cf. City & County of San Francisco v Market Street Ry., 95 Cal App 2d 648, 213 P2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. United States v Paramount Pictures, Inc., 66 F Supp 323, 341--46 (SD NY 1946); 334 US 131, 144--48, 92 L Ed 1260, 68 S Ct 915 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2).

This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See Potts v Flax, 313 F2d 284 (5th Cir 1963); Bailey v Patterson, 323 F2d 201 (5th Cir 1963), cert den 376 US 910, 11 L Ed 2d 609, 84 S Ct 666 (1964); Brunson v Board of Trustees of School District No. 1, Clarendon Cty., S.C., 311 F2d 107 (4th Cir 1962), cert den 373 US 933, 10 L Ed 2d 690, 83 S Ct 1538 (1963); Green v School Bd. of Roanoke, Va., 304 F2d 118 (4th Cir 1962); Orleans Parish School Bd. v Bush, 242 F2d 156 (5th Cir 1957), cert den 354 US 921, 1 L Ed 2d 1436, 77 S Ct 1380 (1957); Mannings v Board of Public Inst. of Hillsborough County, Fla., 277 F2d 370 (5th Cir 1960); Northcross v Board of Ed. of City of Memphis, 302 F2d 818 (6th Cir 1962), cert den 370 US 944, 8 L Ed 2d 810, 82 S Ct 1586 (1962); Frasier v Board of Trustees of Univ. of N.C., 134 F Supp 589 (MD NC 1955, 3-judge court), affd, 350 US 979, 100 L Ed 848, 76 S Ct 467 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of

a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3).

In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of

reliance by the persons to whom they were addressed. See Oppenheimer v F. J. Young & Co., Inc., 144 F2d 387 (2d Cir 1944); Miller v National City Bank of N. Y., 166 F2d 723 (2d Cir 1948); and for like problems in other contexts, see Hughes v Encyclopaedia Britannica, 199 F2d 295 (7th Cir 1952); Sturgeon v Great Lakes Steel Corp., 143 F2d 819 (6th Cir 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See Pennsylvania R.R. v United States, 111 F Supp 80 (DNJ 1953); cf. Weinstein, supra, 9 Buffalo L Rev at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See Union Carbide & Carbon Corp. v Nisley, 300 F2d 561 (10th Cir 1961), pet cert dism, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); cf. Weeks v Bareco Oil Co., 125 F2d 84

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L Rev at 438--54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such

massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)--(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See Weeks v Bareco Oil Co., 125 F2d 84, 88--90, 93--94 (7th Cir 1941) (anti-trust action); see also Pentland v Dravo Corp., 152 F2d 851 (3d Cir 1945), and Chafee, supra, at 273--75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 USC § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 USC § 216(b) are not intended to be affected by Rule 23, as amended.] In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would

ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1).

In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3).

As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3).

The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the

existence of a "limited fund," the judgment, while extending to all claims of class members against the debtor. See ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par 23.11 [4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in Union Carbide & Carbon Corp. v Nisley, 300 F2d 561 (10th Cir 1961), pet cert dism, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); York v Guaranty Trust Co., 143 F2d 503, 529 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945); Pentland v Dravo Corp., 152 F2d 851, 856 (3d Cir 1945); Speed v Transamerica Corp., 100 F Supp 461, 463 (D Del 1951); State Wholesale Grocers v Great Atl. & Pac. Tea Co., 24 FRd 510 (ND Ill 1959); Alabama Ind. Serv. Stat. Assn. v Shell Pet. Corp., 28 F Supp 386, 390 (ND Ala 1939); Tolliver v Cudahy Packing Co., 39 F Supp 337, 339 (ED Tenn 1941); Kalven & Rosenfield, supra, 8 U of Chi L Rev 684 (1941); Comment, 53 Nw UL Rev 627, 632--33 (1958); Developments in the Law, supra, 71 Harv L Rev at 935; 2 Barron & Holtzoff, supra, § 568; but cf. Lockwood v Hercules Powder Co., 7 FRD 24, 28--29 (WD Mo 1947); Abram v Sam Joaquin Cotton Oil Co., 46 F Supp 969, 976--77 (SD Calif 1942); Chafee, supra, at 280, 285; 3 Moore, supra, par 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the

former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L Rev at 460.

Subdivision (c)(4).

This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d)

is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to

simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2)

sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see United States v American Optical Co., 97 F Supp 66 (ND Ill 1951), and 1950--51 CCH Trade Cases 64573--74 (par 62869); cf. Weeks v Bareco Oil Co., 125 F2d 84, 94 (7th Cir 1941), and notice may encourage interventions to improve the representation of the class. Cf. Oppenheimer v F. J. Young & Co., 144 F2d 387 (2d Cir 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in Sam Fox Publishing Co. v United States, 366 US 683, 6 L Ed 2d 604, 81 S Ct 1309 (1961).

Subdivision (d)(2)

does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3)

class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See Hansberry v Lee, 311 US 32, 85 L Ed 22, 61 S Ct 115, 132 ALR 741 (1940); Mullane v Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950); cf. Dickinson v Burnham, 197 F2d 973, 979 (2d Cir 1952), and studies cited at 979 n 4; see also All American Airways, Inc. v Elderd, 209 F2d 247, 249 (2d Cir 1954); Gart v Cole, 263 F2d 244, 248--49 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230--31; Brendle v Smith, 7 FRD 119 (SD NY 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in Cherner v Transitron Electronic Corp., 201 F Supp 934 (D Mass 1962); Hormel v United States, 17 FRD 303 (SD NY 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3)

reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c) (1) above; and recognizes that the

imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e)

requires approval of the court, after notice, for the dismissal or compromise of any class action.

APPENDIX E

RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND ADVISORY COMMITTEE NOTES ACCOMPANYING THE 1966 AMENDMENTS TO RULE 23

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

In re Vivendi Universal, S.A. Sec. Litig.

Docket Number(s): U.S.D.C., S.D.N.Y. 1:01-cv-5571-RJH-HBP

Motion for: Permission to Appeal Pursuant to Fed.R.Civ.P. 23(f)

Set forth below precise, complete statement of relief sought:
Permission to appeal that portionsof the District Court's class certification order that excluded from the class putative class members who are citizens of countries other than the United States, France, England, and the Netherlands.

MOVING PARTY: Capital Invest, die Kapitalanlagegesellschaft der Bank Austria Creditanstalt
☒ Plaintiff ☐ Defendant Gruppe GmbH
☒ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Vivendi Universal, S.A.

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Court/Judge/Agency appealed from: U.S.D.C., S.D.N.Y., The Hon. Richard J. Holwell

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No

Is oral argument requested? ☐ Yes ☒ No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☒ No
If yes, enter date

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☒ No

Has this relief been previously sought in this Court? ☐ Yes ☒ No

Requested return date and explanation of emergency:

Signature of Moving Attorney: Date: April 5, 2007

Has service been effected? XX Yes ☐ No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:
THOMAS ASREEN, Acting Clerk of Court

Date: By:

Form T-1080 (Revised 11/01/06).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	**U.S.D.C., S.D.N.Y.** **Civil Action No. 1:02-cv-05571-RJH-HBP**

MOTION AND PETITION OF CAPITAL INVEST, DIE KAPITALANLAGEGESELLSCHAFT DER BANK AUSTRIA CREDITANSTALT GRUPPE GMBH FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

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JURISDICTIONAL STATEMENT

Pursuant to Fed. R. Civ. P. 23(f), 28 U.S.C. § 1292(e), and Fed. R. App. P. 5, Plaintiff Capital Invest, die Kapitalanlagegesellschaft der Bank Austria Creditanstalt Gruppe GmbH moves this Court and petitions for permission to appeal that portion of the class certification order entered by the Honorable Richard J. Holwell, United States District Judge, *In re Vivendi Universal, S.A. Secs. Litig.*, No. 02 Civ. 5571 (RJH) (HBP), 2007 WL 861147 (S.D.N.Y. March 22, 2007), excluding from the class putative class members other than citizens of the United States, France, England, and the Netherlands. This motion and petition is timely filed on April 6, 2007, within ten (10) business days of entry of the order on March 23, 2007, pursuant to Fed. R. Civ. P. 6(a) and 23(f) and Fed. R. App. P. 26(a)(2).

ISSUE PRESENTED FOR REVIEW

Pursuant to Fed. R. Civ. P. 23(f), an appeal should be allowed from the District Court's class certification order to consider the following issue:

Did the District Court err in concluding that the class should not include as class members citizens of Germany, Austria, and countries other than the United States, France, England, and the Netherlands, who purchased or otherwise acquired ordinary shares or American Depository Shares of Vivendi Universal, S.A. between October 20, 2000 and August 14, 2002 when, in so doing, (a) it rejected the traditional "near certainty" test and substituted its own, unique "more likely than not" balancing standard to evaluate whether res judicata concerns defeated superiority; (b) it shifted the burden of proof from Defendants to Plaintiffs with respect to proving Defendants' res judicata defense to Plaintiffs' showing of superiority; and (c) it treated its novel "more likely than not" balancing standard as a dispositive

test rather than one of many factors to be considered in a superiority analysis?

STATEMENT OF FACTS

A. Factual Background

Vivendi Universal, S.A. ("Vivendi") is a corporation organized under the laws of France. It is a global conglomerate in the communications and environmental services businesses. Vivendi's total number of outstanding shares (ordinary shares and American Depository Shares ("ADSs")) throughout the Class Period was approximately 1.08 billion; of these, approximately *seventy-five* percent were held by shareholders who were not citizens of the United States. *See In re Vivendi Universal, S.A. Secs. Litig.*, No. 02 Civ. 5571 (RJH) (HBP), 2007 WL 861147, at *2 (S.D.N.Y. March 22, 2007). During the Class Period, "virtually all of Vivendi's ADSs – which traded on the NYSE – were held by persons or entities in North America, while virtually all of Vivendi's ordinary shares – traded predominantly on the Paris Bourse – were held by persons or entities outside the United States, predominantly in France and the rest of Europe." *Id.*

Beginning in June 1996, Vivendi embarked on a massive acquisition binge, acquiring equity positions in numerous U.S. and non-U.S. companies. Vivendi financed these acquisitions by borrowing cash against future earnings and, in the process, taking on $21 billion in debt. In order to sustain this growth strategy, Vivendi began issuing false and misleading public statements about its financial condition, all while denying rumored problems. *Id.* at *2. In July 2002, the house of cards fell, senior management resigned, and Vivendi's securities prices collapsed. *Id.* at *4. New management admitted that, had management not resigned, Vivendi "would have been forced to declare bankruptcy within 10 days." *Id.* Not surprisingly, a formal investigation

by the SEC ensued, culminating in *SEC v. Vivendi Universal, et al.*, No. 03-CV-10195-PKC (S.D.N.Y.).[1]

B. The Litigation

On July 18, 2002, Plaintiffs brought this securities fraud class action against Vivendi and its two most senior former officers, Jean-Marie Messier (former CEO) and Guillaume Hannezo (former CFO). The gravamen of Plaintiffs' claims is that Defendants' materially false and misleading statements caused Vivendi securities to trade at artificially high prices. On February 24, 2003, Defendants filed a motion to dismiss, contending, *inter alia*, that the court lacked subject matter jurisdiction over claims brought by *foreign* class members who acquired Vivendi ordinary shares traded on foreign markets. *Vivendi*, 381 F. Supp. 2d 158, 169 (S.D.N.Y. Nov. 3, 2003). The court denied that portion of the motion, *id.* at 170, concluding that "defendants' conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad." *Vivendi*, 2007 WL 861147, at *1 (quoting *Vivendi*, 381 F. Supp. 2d at 169). The court also denied Defendants' motion for reconsideration. *Vivendi*, No. 02 Civ. 5571 (RJH), 2004 WL 2375830, at *7 (S.D.N.Y. Oct. 22, 2004) ("Messier's and Hannezo's conduct in the United States, as alleged controlling officers of Vivendi and alleged instigators of the fraudulent scheme, significantly contributed to the alleged fraud and . . . directly caused foreign investors' alleged losses.").

---

[1] The action brought by the SEC was resolved by a settlement in which class members from any foreign country may take part, recovering from Defendants approximately $51,000,000. *See* http://www.vivendisecsettlement.com.

C. The Class Certification Decision

On July 15, 2005, Plaintiffs filed a motion to certify a class pursuant to Fed. R. Civ. P. 23, consisting of all persons who purchased or otherwise acquired Vivendi ordinary shares or ADSs between October 20, 2000 and August 14, 2002. On March 22, 2007, the court granted that motion in part and denied it in part. *See Vivendi*, 2007 WL 861147, at *1. For the purposes of this request for Rule 23(f) interlocutory appeal, the salient part of this decision excluded from the Class not only all Austrian and German shareholders, but also those from all countries *other than* the United States, France, England, and the Netherlands. *Id.* at *18, 28-32, 35.

The court's decision to exclude these putative class members was made within the context of its analysis of the superiority of class action treatment pursuant to Rule 23(b)(3). The decision was based entirely on the court's concerns about the recognition or enforceability of a U.S. judgment in various foreign countries. The court began with a discussion of the "near certainty" test and a description of *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975), from which the test was distilled. 2007 WL 861147, at *15. It then quoted the seminal sentence from *Bersch*: "while an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a *near certainty* . . . " *Id.* at *16 (quoting *Bersch*, 519 F.2d at 996).

Characterizing the decisions made by the progeny of *Bersch* as "haphazard," *id.*, the court criticized the traditional test. *Id.* at *18 ("the Court does not find the 'near certainty' standard to be a particularly useful analytical tool."). Nor, it mused, "is it likely that only where nonrecognition is 'a mere possibility' ought a court find superiority to be established. It seems more appropriate, instead, to evaluate the risk of

nonrecognition along a continuum." *Id.* With that, the court began to articulate its own test: "Where plaintiffs are able to establish a *probability* that a foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement." *Id.* (emphasis added). Then the court fine-tuned it: "Where plaintiffs are unable to show that foreign court recognition is *more likely than not*, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class." *Id.* (emphasis added).

The court then applied this novel standard to France (concluding that a U.S. judgment would, more likely than not, be accorded recognition), *id.* at *26, to England (concluding the same), *id.* at *28, and to the Netherlands (concluding the same), *id.* at *31. It drew the opposite conclusion with respect to Germany and Austria. *Id.* at *28-31.

Finally, with respect to putative class members hailing from other countries, the court's opinion was silent. It simply concluded the opinion by certifying a class "consisting of all persons from the United States, France, England, and the Netherlands who purchased or otherwise acquired ordinary shares or American Depository Shares of Vivendi Universal, S.A. between October 20, 2000 and August 14, 2002." *Id.* at *35.

ARGUMENT

STANDARD OF REVIEW

Rule 23(f) provides that "[a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order." Fed. R. Civ. P. 23(f). The standard for determining whether to grant a Rule 23(f) petition states that Plaintiffs

must demonstrate *either* "(1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, *or* (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001) (emphasis added). Importantly, in applying Rule 23(f), "courts of appeals enjoy 'unfettered discretion' to grant or deny permission to appeal based on 'any consideration that the court of appeals finds persuasive.'" Fed. R. Civ. P. 23(f) advisory committee's notes.

In this case, the district court's decision readily satisfies not just one, but both prongs of the Rule 23(f) test. Accordingly, interlocutory appellate review is not just warranted; it is essential.

A. The Certification Order Will Effectively Terminate the Litigation as to the Putative Class Members Hailing from Countries Other Than the United States, France, England, and the Netherlands, and There Has Been a Substantial Showing that the District Court's Decision Is Questionable

Cases such as this one have been called "death knell" cases, because "the class certification order effectively terminates the litigation." *Sumitomo*, 262 F.3d at 138. The members of the putative class excluded by the district court's ruling do, indeed, hear the clang of the "death knell." Thousands of putative class members from multiple countries have been excluded from the class. For them, the district court's ruling terminates the litigation absent review by this Court pursuant to Rule 23(f). *Id.*

As to whether the decision appealed from is questionable, the court's opinion can only be understood as

contrary to settled authority both within and without the Second Circuit. Its wholesale rejection of the traditional "near certainty" bright-line test in favor of a novel, "more likely than not" balancing standard is a stunning departure from applicable precedents. Interlocutory review is particularly appropriate where, as here, "it promises to spare the parties and the district court the expense and burden of litigating the matter to final judgment only to have it inevitably reversed by this Court on appeal after final judgment." Id. at 139 (citation omitted).

1. *The "Near Certainty" Test or the "More Likely Than Not" Standard*

The "near certainty" test was first articulated by Judge Friendly in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975) ("while an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a *near certainty*") (emphasis added). District courts both within and without the Second Circuit have consistently used the "near certainty" test in the superiority analysis of class certification decisions as well as in subject matter jurisdiction decisions. The test has enjoyed hegemony, across contexts and jurisdictions, for approximately thirty years.

The "near certainty" test provides that class certification is appropriate unless there is a *near certainty* that a foreign court will not recognize or enforce the American court's judgment. A mere possibility that a foreign court may not recognize or enforce it will not suffice. The presumption is explicitly placed in favor of class certification. For example, in *In re Turkcell Iletisim Hizmetler, A.S.* Secs. *Litig.*, the court held that "[t]he case law suggests that if there is *some* possibility that a class action judgment would be enforceable – or at least have some substantial effect – in the foreign jurisdiction at issue, then class certification is proper. . . .

Based on the affidavits before us, we cannot conclude that a Turkish court would give *no* weight to a judgment of this court." 209 F.R.D. 353, 360 (S.D.N.Y. 2002) (certifying the class) (emphasis added). Similarly, in *Cromer Fin. Ltd. v. Berger*, the court held, "the res judicata effect of a class action is a factor that must be considered in evaluating the superiority of the class action device.... There is a distinction, however, between those circumstances in which there is a 'possibility' that a foreign court may not recognize a judgment and those in which there is 'near certainty' that it will not be recognized." 205 F.R.D. 113, 134-35 (S.D.N.Y. 2001) (certifying the class).

Courts in other jurisdictions routinely reach identical conclusions. *See, e.g., Frietsch v. Refco, Inc.*, No. 92 C 6844, 1994 WL 10014, at *11 (N.D. Ill. Jan. 13, 1994) (finding that neither "dueling affidavits" nor "the cases cited by defendants provides a basis for denying class certification"); *Jordan v. Global Natural Resources*, 102 F.R.D. 45, 52 (S.D. Ohio 1984) (holding that "[e]ven assuming the appropriateness of abstention, the standard for such abstention is 'near certainty'" and that defendant had not met that standard); *Casper v. Cunard Line, Ltd.*, 560 F. Supp. 240, 243 (E.D. Pa. 1983) ("'Near certainty' is the standard for abstention and defendant has failed to make such a showing.").[2]

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[2] This same "near certainty" test has been employed by courts across jurisdictions in the context of subject matter jurisdiction as well, further demonstrating the test's hegemony. *See, e.g., In re Royal Dutch/Shell Transp. Secs. Litig.*, 380 F. Supp. 2d 509, 547 (D.N.J. 2005) ("Defendants' res judicata arguments are unpersuasive. The probability alleged by Defendants of foreign courts failing to enforce a judgment of this Court is not a near certainty."); *In re Cable & Wireless, PLC, Secs. Litig.*, 321 F. Supp. 2d 749, 765-66 (E.D. Va. 2004) ("Defendants attached a declaration of Lord Grabiner QC, an English barrister [who] opined that there is a substantial risk that an English court would refuse to recognize a judgment entered in this action if a foreign class member were to later bring a similar proceeding in England.... Defendants ...

Against this backdrop, it is clear that the district court's decision dramatically restated the relevant standard, which up until that time had been the "near certainty" test. Not persuaded by the analysis of the many district courts to consider the question before it, much less Judge Friendly's seminal opinion in *Bersch*, the district court substituted a novel standard, positing that such cases should be adjudged along a "continuum." 2007 WL 861147, at *18. The district court restated the test this way: "Where plaintiffs are able to establish a *probability* that a foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement. . . . Where plaintiffs are unable to show that foreign court recognition is *more likely than not*, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class." *Id.* (emphasis added).

As the district court proceeded with its analysis, it went even beyond defendants' experts at times, *id.* at *30, apparently considering matters *sua sponte*. After discussing international law, the court concluded that it was "left with the distinct *impression* that the formalities of German law *may well* preclude the recognition of a judgment in the instant case." *Id.* (emphasis added). Somehow the court's subjective impressions, formed after a foray into international law not even undertaken by the experts, trumped the rule that has been in place, across the country, for the last thirty years.

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cite the 'mere possibility' that they may be exposed to multiple suits because a court in England may not recognize a judgment in this action. This argument . . . is unpersuasive. The *Cromer* court addressed this issue and drew a distinction from 'those circumstances in which there is a *possibility* that a foreign court may not recognize a judgment, and those in which there is a *near certainty* that [a U.S. judgment] will not be recognized.' The possibility of an English court failing to give res judicata to a judgment of this Court is not a near certainty.") (citation omitted) (emphasis in original).

The results in application are astonishing. The difference between the "near certainty" test and the district court's new standard cannot be gainsaid. If it becomes the Second Circuit's test, thousands of foreign investor plaintiffs will routinely be excluded from class definitions that otherwise would have cleared the "near certainty" test without difficulty. Moreover, under the traditional analysis, if the recognition *vel non* of a U.S. class action judgment by a foreign court was an open question in that foreign country, the result was uncontroversial – plaintiffs won on the issue. *E.g.*, *Cromer*, 205 F.R.D. at 135-36; *Frietsch*, 1994 WL 10014, at *11; *see also Casper*, 560 F. Supp. at 243 & n.2. In contrast, the district court's approach would necessitate an expensive, time consuming, country-by-country analysis rather than the eminently useable, bright line "near certainty" test. Courts would be required to sort even through facts almost in equipoise, to predict the outcome of res judicata issues even in the absence of rulings by the foreign country in question.

2. *Shifting the Burden from Defendants to Plaintiffs*

Moreover, Defendants should not assume that, as between the parties, the burden would be the Plaintiffs' alone. After restating the standard, the district court inserted a citation to *In re Initial Public Offerings. Litig.*, 471 F.3d 24, 33 (2d Cir. 2006) ("*IPO*"), for the uncontroversial assertion that Plaintiffs have the burden to produce some evidence of compliance with Rule 23 and to show that its requirements are met. 2007 WL 861147, at *18. But the court also used *IPO* to shift to Plaintiffs the burden of establishing the requisite res judicata probability, *id.*, whereas under the traditional approach, courts focused on *defendants'* failure to show the requisite "near certainty." Obviously, plaintiffs have the burden of establishing superiority, but traditionally, it has been the defendants' burden to establish their res judicata defense. *E.g.*, *Cromer*, 205 F.R.D. at 136 ("In sum,

the plaintiffs have shown that the benefits of class certification are significant and that this device is superior . . . Because *Deloitte has not presented arguments sufficient to outweigh these demonstrated benefits*, the motion to certify a class of investors is granted.") (emphasis added); *Jordan*, 102 F.R.D. at 52 ("*Defendant* has presented nothing in support of its contention that foreign courts will not recognize a judgment entered by this Court. Therefore, it is unnecessary to pursue this matter.") (emphasis added); *Casper*, 560 F. Supp. at 243 ("'*Near certainty*' is the standard for abstention and *defendant* has failed to make such a showing.") (emphasis added). The district court's decision turned this burden on its head.

3. *Treating Res Judicata Analysis as the Sole Factor to Be Considered*

Finally, although the court made much of the fact that the res judicata issue is but one factor to be considered, 2007 WL 861147, at *18, it was the *only* factor the court considered with respect to Germany and Austria. *Id.* at *28-30. The court's summary, single-paragraph treatment of Austria was confined to observing the expert's testimony that no reciprocity treaty existed between the United States and Austria, and to the court's conclusion that Plaintiffs' expert's averment that the reciprocity requirement was unconstitutional "f[e]ll far short of establishing a probability that an Austrian court would grant preclusive effect to any judgment or settlement issuing from this action." *Id.* at *30. Despite the existence of putative class members in other foreign countries, the district court made no mention whatsoever in its opinion of the likelihood of res judicata effect given to U.S. judgments or settlements in countries

other than Germany, Austria, the United States, France, England, and the Netherlands.[3]

In contrast, other courts have followed settled authority and included other practical considerations, such as personal jurisdiction or relevant statutes of limitations, in their analyses and have concluded that such considerations may trump even justifiable res judicata concerns, resulting in certification of the class. *See, e.g.*, *U.S. Fin. Secs. Litigs.*, 69 F.R.D. 24, 48 (S.D. Cal. 1975) (holding that despite justifiable concern regarding res judicata issue, a class action still remained feasible for numerous practical reasons); *see also Cromer*, 205 F.R.D. at 135 ("Even where all the available evidence indicates that foreign plaintiffs who lose in the United States will be able to sue the defendant a second time in their own country, a class action may remain the superior means for litigating the dispute"). In this case, for example, there was no showing that German or Austrian courts could assert personal jurisdiction over Vivendi or that relevant statutes of limitations had not run. Similarly, there was no showing that a securities case, like the one brought here, could legally or practically be pursued in Germany, Austria, or the other excluded countries. If cases could not be brought in these countries in the first instance, res judicata is irrelevant.

Although the district court briefly touched on these practical matters in a conclusory fashion, noting that "Defendants' res judicata concerns are 'more hypothetical than real,' since the likelihood of relitigation by absent class

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[3] Accordingly, the subtext of this holding is that whoever it is that holds the burden of proof as to the res judicata defense to superiority – plaintiffs (according to the district court) or defendants (the traditional view) – that party has the extraordinary burden of obtaining expert affidavits from every single country in which putative class members may be found regarding the precise level of probability (not just "near certainty") that res judicata effect will be given in that country to U.S. judgments or settlements. *See supra* Section A.2.

members in a European forum is low," *Vivendi*, 2007 WL 861147, at *32, it simply set such issues aside without analysis. It stated only that

> [w]hile it could be argued that practical considerations weigh strongly in favor of allowing all foreign purchasers to participate in plaintiffs' proposed class, the Court elects to proceed with caution and limit the class to foreign shareholders whose courts, in the unlikely event of successive litigations, are likely to give res judicata effect to any judgment herein. This double layer of security should allay defendants' legitimate concerns.

Id. In short, it basically stated that practical considerations are important, and indeed, they may well weigh in favor of allowing all foreign purchasers to participate in the class, but that it chose in the end to ignore these practical considerations. Why it did so is left open to surmise and conjecture; no real explanation was given.

In sum, Plaintiff seeks interlocutory appeal of a decision that departed from the traditional test that has been in place for three decades and substituted a standard that, at bottom, its highly subjective and requires far more from the parties and the courts; a decision that shifted the burden traditionally shouldered by Defendants to establish their defense to Plaintiffs; and a decision that, in application, considered and made dispositive only one of the many factors deemed important to a determination regarding superiority. For all these reasons, Plaintiff has made a substantial showing that the district court's decision is, to say the least, "questionable." *Sumitomo*, 262 F.3d at 139.

B. The Certification Order Implicates a Legal Question About Which There Is a Compelling Need for Immediate Resolution

No more is needed, but in an excess of caution, Plaintiff submits that interlocutory review is also warranted under the second prong of the Rule 23(f) test. According to established Second Circuit precedent, a compelling need for immediate review exists when a "novel legal question ... is of fundamental importance to the development of the law of class actions and it is likely to escape effective review after entry of final judgment." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 77 (2d Cir. 2004) (quoting *Sumitomo*, 262 F.3d at 140). With respect to these cases, "the more fundamental the [legal] question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal under Rule 23(f)." *Sumitomo*, 262 F.3d at 138 (citation omitted). The Second Circuit has found an issue presented on a Rule 23(f) petition "not only novel but also significant" when the doctrine at issue would extend class actions to a new group of people. *Hevesi*, 366 F.3d at 80. Moreover, "very few securities class actions are litigated to conclusion, so review of [a] novel and important legal issue ... may be possible only through the Rule 23(f) device." *Id.* (citation omitted).

In light of the discussion in the preceding section, the compelling need for immediate review is readily evident. The district court's novel approach would mandate lengthy, time consuming, country-by-country determinations to calibrate "more likely than not" probability, to be measured by a much more subjective approach. This decision, were it to become Second Circuit law, would profoundly affect the development of the law of class actions as it pertains to foreign putative class members – it is a revolutionary change both in placement of the burden and in the requisite evidentiary showing. Inasmuch as the question presented by a Rule 23(f) petition has been deemed significant when the

doctrine at issue would extend class actions to a new group of people, *id.*, it must surely also be significant when it would exclude a group of people from a class action, people who heretofore would have been included under the traditional "near certainty" test.

CONCLUSION

This case presents the Court with an opportunity to speak on an issue that has not been revisited since the Court's 1975 decision in *Bersch*. In the last three decades, district courts within this Circuit and across the country have come to a settled understanding of what *Bersch* required: near certainty. Since that 1975 decision, the global economy has exploded, resulting in lawsuits that no one at that time could have anticipated. This issue is likely to recur, given the increasing number of global class actions brought in federal court. Inasmuch as the district court has departed from settled precedent in a "death knell" case in an area of fundamental importance to the development of the law of class actions, Plaintiff urges the Court to permit this interlocutory appeal.

WHEREFORE, Plaintiff respectfully requests that this Court grant review under Rule 23(f) of the District Court's certification order.

Dated: Hartford, CT
April 5, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of April, 2007, a true and correct copy of the foregoing Motion and Petition Of Capital Invest, Die Kapitalanlagegesellschaft Der Bank Austria Creditanstalt Gruppe GMBH For Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) was placed in the U.S. Mails, with postage prepaid thereon and properly addressed to:

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APPENDIX F

PETITION OF DEFENDANT VIVENDI, S.A. PURSUANT TO FED. R. CIV. P. 23(F) FOR LEAVE TO APPEAL FROM THE DISTRCT COURT'S CLASS CERTIFICATION ORDER, FILED APRIL 9, 2007

No.____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION

ON PETITION TO APPEAL FROM AN ORDER ENTERED ON
MARCH 26, 2007,
BY THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
GRANTING CLASS CERTIFICATION
02 CIV. 5571 (RJH) (HBP) (S.D.N.Y.)

PETITION OF DEFENDANT VIVENDI, S.A. PURSUANT TO FED. R. CIV. P. 23(f) FOR LEAVE TO APPEAL FROM THE DISTRICT COURT'S CLASS CERTIFICATION ORDER

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Fed R. App. P. 26.1 Disclosure Statement

Petitioner Vivendi, S.A., sued herein as Vivendi Universal S.A., is a publicly-held corporation with no parent company. No publicly-held company owns 10 percent or more of Petitioner's stock.

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Jacoby, Mary, For the Tort Bar, A New Client Base: European, Investors, Wall St. J., (Sept. 2, 2005), at A1 19

Moore, James Wm. et al., Moore's Federal Practice ¶ 23.104(2)(a)(v) (3d ed. 2006) 11

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Table of Abbreviations

FACC	Plaintiffs' First Amended Consolidated Class Action Complaint, filed with the district court on November 24, 2003.
Pls. 7/15/05 Mot.	Plaintiffs' Memorandum of Law in Support of Their Substituted Motion for Class Certification, filed with the district court on July 5, 2005.
VU 10/5/05 Opp. Br.	Vivendi, S.A.'s Memorandum in Opposition to Plaintiffs' Substituted Motion for Class Certification, filed with the district court on October, 5, 2005.
Pls. 12/21/05 Rep. Br.	Plaintiffs' Reply Memorandum of Law in Further Support of Their Substituted Motion for Class Certification, filed with the district court on December 21, 2005.
7/18/06 Oral Arg. Tr.	Transcript of oral argument regarding plaintiffs' motion for class certification, held before the district court on July 18, 2006.

Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure and Rule 5 of the Federal Rules of Appellate Procedure, defendant Vivendi, S.A. ("Vivendi") respectfully petitions for leave to appeal from the district court's class certification Memorandum Opinion and Order in In re Vivendi Universal, S.A. Sec. Litig., 02 Civ. 5571 (RJH) (HBP) (S.D.N.Y.) (hereinafter "Order", attached hereto as Exhibit A). This petition is brought within ten days of the March 26, 2007, entry of that Order, as required by Federal Rule of Civil Procedure 23(f).

Questions Presented

1. Can absent foreign claimants who may not be precluded by a judgment or settlement in a U.S. class action from suing the same defendants again in foreign jurisdictions properly be included in a class certified under Rule 23?

2. If a judgment or settlement in a U.S. class action may not be given res judicata effect against the vast majority of class members, can plaintiffs still satisfy the superiority requirement of Rule 23(b)(3) under the standard specified by this Court in In re Initial Public Offering Securities Litigation?

Introduction

Vivendi is a French corporation whose shareholders are largely French. Its principal place of business is in France. Throughout the class period, Vivendi's "ordinary shares – traded predominantly on the Paris Bourse – were held by persons or entities outside the United States, predominantly in France and the rest of Europe". (Order, 5.) Only its American Depository Shares ("ADSs"), representing less than 25 percent of its equity, and owned in large part by non-class members (the Bronfman family), were traded in the U.S. (Id.)

As a French company, Vivendi has consistently opposed any determination by a U.S. court of the rights or claims of French and European shareholders who purchased its ordinary shares on European exchanges. Those shareholders' rights and claims against Vivendi properly can, and should, be resolved in Europe, under European law. Indeed, although opt-out class actions are unconstitutional in France (as confirmed by the French Ministry of Justice (see infra, note 2)), several individual shareholder lawsuits have already been filed against Vivendi in France, premised upon the same allegations at issue in this case. Despite that fact, and over Vivendi's objection, the district court not only exercised subject matter jurisdiction but has now extended the reach of U.S. law to an international class of purchasers in France, England and the Netherlands who bought and sold Vivendi ordinary shares outside the U.S.

To reach that result, the district court created and applied a novel test for superiority under Rule 23(b)(3) – contrary to the principles of res judicata that underlie all class action jurisprudence – and certified a class based on an erroneous determination that a U.S. judgment in this case would "more likely than not" be given preclusive effect in those foreign jurisdictions. (See, e.g., Order, 52.)[1] Although the district court's decision is erroneous in many ways including, in particular, in its analysis and application of French and English law concerning foreign enforcement of a U.S. class action judgment,[2] it does clearly describe the

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[1] The novelty and significance of the district courts decision was not lost on French shareholders. See Associated Press, European Investors to Join Suit Against Vivendi, AP Financial Wire, Mar. 25, 2007, at 1 ("'For the first time, an American judge decided he's competent in a class action regarding alleged violations of American securities laws by French managers of a French company at the expense of French shareholders," French shareholders activist organization ADAM said in a statement Sunday.").

[2] A view shared by the French Ministry of Justice, which, following the district court decision, provided Vivendi with a brief on the relevant

confusion and disarray that exists at the district court level on the compelling legal questions presented here. Those questions, which go to the heart of the growing trend of attempts by plaintiffs to include the absent purchasers of foreign securities, on foreign exchanges, in U.S. class actions under U.S. securities laws, have not yet been addressed by this Circuit, but need to be addressed following this Court's recent decision in In re Initial Public Offering Securities Litigation, 471 F.3d 24 (2d Cir. 2006), reh'g denied April 6, 2007 ("In re IPO"), which fundamentally altered the law in this area, and placed the burden squarely on plaintiffs to show "actual, not presumed" conformance with the requirements of Rules 23(a) and 23(b)(3) as a prerequisite to class certification. Id., 33-41. Moreover, the sheer size of the certified class in this case (1.08 billion outstanding Vivendi shares during the class period, of which roughly 80 percent were held by absent foreign purchasers (Order, 4)), and the enormous damages now likely to be sought – both of which place huge pressure on Vivendi to settle – are compelling

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French law on enforcement of U.S.-style class action judgments. (The Ministry's letter and Brief are attached hereto as Exhibit B. Given their provenance and obvious relevance to this appeal, Vivendi respectfully seeks leave, through a motion filed April 9, 2007, to file them herewith.) The French Ministry's view differs materially from the district court's, and supports the previous submissions of Vivendi's experts. For example, the Ministry disagrees with the district court's finding of a "characterized link", necessary for enforcement in France, based solely upon the U.S. court's own prior ruling on subject matter jurisdiction. (Order, 40-42.) Instead, the Ministry confirms that the question of a "characterized link" is to be analyzed by reference to "the dispute, the plaintiffs and the [French] court to which it is referred" (i.e., as between Vivendi and its French shareholders, who have no connection whatsoever to this forum). (Ex. B., "Brief", 2 (emphasis added)) The French Ministry also confirms that opt-out class actions are unconstitutional in France. (Id.) Consequently, as Vivendi's experts unanimously concluded, it is certain that a judgment of the district court in this case will not be recognized in France and Vivendi's French shareholders should therefore have been excluded from the class.

reasons why this Court should act now to ensure that the very serious questions raised here do not escape appellate review.

Background

On January 7, 2003, plaintiffs filed a consolidated class action complaint against Vivendi, Jean-Marie Messier (Vivendi's former CEO) and Guillaume Hannezo (Vivendi's former CFO), alleging violations of Sections 11 and 12(a) of the Securities Act of 1933, Section 14(a) of the Securities Exchange Act of 1934, and Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5.[3] Plaintiffs' Securities Act allegations relate to allegedly false and misleading statements or omissions in the October 30, 2000, Form F-4 Registration Statement and Prospectus issued prior to the December 8, 2000, merger among Vivendi, Canal Plus, S.A. and The Seagram Company Ltd. Plaintiffs' Exchange Act allegations relate to allegedly false or misleading statements or omissions in certain of Vivendi's public statements between October 30, 2000, and August 14, 2002. Plaintiffs' Section 14(a) claim was dismissed with prejudice on April 1, 2004.

On July 15, 2005, plaintiffs filed and served a substituted motion for certification of a global class consisting of all persons worldwide who purchased or otherwise acquired Vivendi's common stock or ADSs during the proposed class period: October 30, 2000, to August 14, 2002. Vivendi filed and served its initial opposition papers on October 5, 2005.[4]

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[3] Two individual actions filed in the Southern District of New York, Liberty Media Corp. v. Vivendi Universal, S.A., 03 Civ 2175, filed March 28, 2003, and GAMCO Investors, Inc. v. Vivendi Universal, S.A., 03 Civ. 5911, filed August 6, 2003, have been consolidated with the present case for pretrial purposes.

[4] Together with its opposition papers, Vivendi filed 12 expert declarations confirming, inter alia, that a judgment or settlement in a U.S. "opt-out"

By Order entered March 26, 2007, the district court certified a class "consisting of all persons from the United States, France, England, and the Netherlands who purchased or otherwise acquired ordinary shares or [ADSs] of Vivendi" between October 20, 2000, and August 14, 2002.[5] (Order, 68)[6] However, with respect to Germany and Austria, the district court found that "it is more likely than not that the German and Austrian courts, at present, will not give res judicata effect to judgments or settlements in a U.S. opt-out class action". (Id., 59.) As a result, foreign purchasers in those jurisdictions were excluded from the class as certified. Vivendi does not seek to appeal that part of the district court's Order.

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class action would not be recognized or enforced in France, England, Germany or Austria. Plaintiffs filed their reply papers on December 21, 2005, together with, for the first time, expert declarations in response. Vivendi filed a sur-reply on February 6, 2006, with two expert declarations in support. Plaintiffs subsequently filed another expert declaration on June 26, 2006, to which Vivendi responded with an expert declaration on July 10, 2006. Plaintiffs filed a further expert declaration on July 17, 2006. Oral argument on class certification occurred on July 18, 2006.

[5] The Order erroneously describes the proposed class period as beginning on October 20, 2000. (Order, 2, 68.) In fact, the class period proposed by plaintiffs begins on October 30, 2000. (Id., 4; FACC ¶ 2; Pls. 7/15/05 Mot.,1.) Vivendi has raised this typographical error with plaintiffs' counsel and intends to bring it to the attention of the district court so that it can be corrected.

[6] Improperly rejecting Vivendi's arguments and ignoring plaintiffs' concession (see Pls. 12/21/05 Rep. Br., 16), the district court also erroneously included in the class so-called "in and out" purchasers (Order, 15-16) who could not have experienced any loss. See Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005). After In re IPO, it is appropriate for courts to consider damages as part of a Rule 23 analysis (Order, 16), and such purchasers should be excluded from the class. See In re IPO, 471 F.3d at 41-42.

Legal Standard

Rule 23(f) provides: "A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under [Rule 23] if application is made to it within ten days after entry of the order." This Court has "unfettered discretion" to grant an appeal of a class certification decision. Fed. R. Civ. P. 23(f) advisory committee's note (1966). Parties seeking to appeal under Rule 23(f) must show "either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution". Hevesi v. Citigroup, Inc., 366 F.3d 70, 76 (2d Cir. 2004). Either one of those criteria is sufficient; the district court's Order in this case meets both.[7] Nevertheless, "a petition failing to satisfy either of the alternative requirements may nevertheless be granted where it presents special circumstances that militate in favor of an immediate appeal". Id., 76 n.4.

If an appeal is granted, a court of appeals will review a district court's order granting class certification for abuse of discretion. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162 (2d Cir. 2001). However, the court will "review de novo the district court's conclusions of law that

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[7] The second threshold requirement will be met where there is a legal question "of fundamental importance to the development of the law of class actions" that is "likely to escape effective review after entry of final judgment". Hevesi, 366 F.3d at 77. Legal questions of such fundamental importance often exist where, as here, the district court's certification decision would extend the reach of securities class actions. See, e.g., id., 79-80. Moreover, this Court has previously recognized that in class actions where class members could be entitled to a "staggering amount of money . . . after final judgment", as here, certification decisions are especially unlikely to be reviewed at all, unless a Rule 23(f) appeal is granted. See id., 80.

informed" its class certification decision. Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir. 2003).

Argument

I. An Appeal Is Warranted Because the District Court's New "More Likely Than Not" Test Is Contrary to the Fundamental Requirement of Res Judicata/Claim Preclusion That Underlies Rule 23 Class Actions.

Claim preclusion with respect to all members of a certified class – for subsequent claims premised upon the same allegations – is a fundamental element of Rule 23 class actions. As the Supreme Court has noted, "[t]here is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation". Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984).[8] Indeed, "[t]he central purpose of each of the various forms of class action is to establish a judgment that will bind not only the representative parties but also all nonparticipating members of the class certified by the court". 18A Charles Alan Wright, et al., Fed. Prac. & Proc. § 4455 (2007).[9]

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[8] See also Am. Pipe & Constr. Co., 414 U.S. 538, 547 (1974) ("[I]t was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one."); Mitchem v. Dow Chem. Co., 99 F.3d 401, 401 (2d Cir. 1995) ("[P]roper members of a class are bound by the judgments and determinations in the class proceedings."); Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350, 1355 (2d Cir. 1992) ("It is axiomatic that 'a judgment in a properly entertained class action is binding on class members in any subsequent litigation.'"), rev'd on other grounds, 509 U.S. 155 (1993).

[9] Rule 23 was specifically amended in 1966 to eliminate so-called "spurious" opt-in class actions because they were potentially non-binding on plaintiffs. Opt-in class actions permitted class members "to intervene

Contrary to that fundamental requirement of claim preclusion and res judicata, the district court has unfairly returned to the pre-1966 era and certified a class that includes absent foreign shareholders over whom there may be no such guarantee. The court based its ruling on a newly-articulated test: Rule 23's superiority requirement can be established where plaintiffs are able to establish merely a "probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment". (Order, 37 (emphasis added)) Under that test, absent foreign claimants can be included in a class even though claim preclusion is not certain (as it would be for U.S. class members), but where such preclusion is only "more likely than not". (Id.)[10] There are four reasons why this is a problem:

First, application of a "more likely than not" test raises fundamental due process concerns. It is beyond question that a U.S. corporate defendant sued in a class action where all members of the class are U.S. residents will receive the benefit of complete claim preclusion, following a judgment or settlement. See Cooper, 467 U.S. at 874. In sharp contrast, and as the district court concedes, a foreign defendant (such

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after a decision on the merits favorable to their interests . . . although they would presumably be unaffected by an unfavorable decision." Fed. R. Civ. P. 23 advisory committee's note (1966). Shortly thereafter, the Supreme Court made clear that "[t]he 1966 amendments were designed, in part, specifically to . . . assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments". Am. Pipe, 414 U.S. at 547.

[10] The district court stated, "Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to exclusion of foreign claimants from the class." (Order, 37.) However, Rule 44.1 of the Federal Rules of Civil Procedure requires the court to reach a legal conclusion as to "what foreign law is", (Weiss v. La Suisse, Societe d'Assurances sur la Vie, 313 F. Supp. 2d 241, 244 (S.D.N.Y. 2004)), not to somehow predict what a foreign court may or may not do. The district court's finding that foreign court recognition is "more likely than not" is inadequate under Rule 44.1.

as Vivendi), facing a class comprised mostly of foreign purchasers (close to 75 percent of the class (see Order, 4-5)), receives minimal protection from subsequent claims, despite receiving the same judgment or settlement in the U.S. action. Under the district court's new test, a class including absent foreign class members would still be certified even if there were only a 51 percent likelihood of preclusion. In such circumstances, the district court's failure to afford a foreign defendant (such as Vivendi) the full level of protection to which it is entitled under U.S. law upon class certification – namely complete claim preclusion – is a due process violation. See In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981) (vacated on other grounds, 693 F.2d 847 (9th Cir. 1982) ("Certainly the principle of res judicata, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is a part of the process that is due under our constitutional system.").[11]

Second, because it reduces the preclusive effect of a class action judgment to a matter of probabilities, the district court's test is inconsistent with the mandatory notice requirements of Rule 23(c)(2)(B). That Rule requires that notice to class members "concisely and clearly state in plain, easily understood language . . . the binding effect of a class judgment on class members under Rule 23(c)(3)". (Emphasis added.) The "binding effect" to which the Rule refers is, of course, complete subsequent claim preclusion and res judicata protection for the defendant, following a class action judgment. See Cooper, 467 U.S. at 874. Indeed, the entire

[11] Certifying a class including absent foreign class members, where subsequent claims are only "more likely than not" barred in foreign jurisdictions, also "sacrific[es] procedural fairness" considerations that are at the heart of the superiority analysis under Rule 23(b)(3). See Fed. R. Civ. P. 23 advisory committee's note (1966). That is particularly so in this case, where the district court has certified a class in circumstances where claim preclusion will as a certainty exist only for far less than 25 percent of the class. (Order, 4-5.)

purpose of this Rule is to inform potential class members – consistent with the same requirement of procedural fairness discussed above – of what they give up by choosing not to opt out, and to stay in the class. See 5 James Wm. Moore et al., Moore's Federal Practice ¶ 23.104(2)(a)(v) (3d ed. 2006) ("A Rule 23(c)(2) notice must inform the class members that, if they do not exercise their right to opt out, they will be bound by any judgment rendered in the class action."). Unless claim preclusion is absolute, however, that notice, and that Rule, is meaningless.[12]

Third, by allowing for the possibility that a class will be certified that includes absent foreign purchasers whose claims overseas will not subsequently be barred, the district court's new test creates an incentive for game-playing by foreign claimants and plaintiffs' counsel in foreign jurisdictions. Like plaintiffs in "spurious" opt-in class actions, foreign claimants can simply wait until this litigation has concluded, and any appeal period has expired, before determining whether to participate in any judgment or settlement. If Vivendi wins, the foreign shareholders can file individual suits in France, England or the Netherlands and try again (with the advantage of the factual record developed in the U.S. litigation as a road map). Otherwise, if there is a judgment – litigated or by settlement – against Vivendi, the foreign shareholders will then be able to decide whether they like that recovery or think they can get a higher (or

[12] Vivendi raised this point in its opposition papers. (See VU 10/5/05 Opp. Br., 19-20.) In their reply, plaintiffs could only argue that a class notice stating that subsequent claims "may" be barred would still be sufficient under Rule 23(c)(2), which is plainly incorrect. (See Pls. 12/21/05 Rep. Br., 14 n.10.) Despite the fact that Vivendi raised this point again during oral argument, (see 7/18/06 Oral Argument Tr. at 39:3-6), the district court's Order is silent on this issue.

supplemental) recovery through individual suits in their home countries.[13]

Fourth, if subsequent suits are, in fact, brought in foreign jurisdictions after the end of this litigation, there is no recourse for a class action defendant such as Vivendi, prejudiced by the lack of claim preclusion that at the class certification stage was determined, erroneously, to be "more likely than not". A defendant cannot, following a final judgment, return to a U.S. court for redress. Instead, it would be forced to relitigate the merits of the action in the foreign jurisdiction or to settle (again) with the absent foreign claimant. That result is fundamentally inconsistent with the intended operation of the class action mechanism.

II. An Appeal Will Resolve the Novel and Compelling Legal Question of How the Standard Set Forth in In re IPO Is to Be Applied to the Superiority Requirement Under Rule 23(b)(3) and to the Requirement of Res Judicata in Particular.

There is fundamental confusion among the lower courts in this Circuit as to the relationship between the requirement of res judicata and the determination of class action "superiority" under Rule 23(b)(3). The lower courts seem to agree that res judicata is an element of the superiority requirement, but they clearly disagree on whether superiority

[13] This concern is not hypothetical – there are already several shareholder suits pending against Vivendi in France (see Order, 29-30), and given the ten-year statute of limitations in France for fraud against a corporation (Code Civile, art. 2270-1), foreign purchasers could wait until their claims have been adjudicated in a U.S. court before even filing a foreign claim. This is just the kind of "second bite at the apple" that Rule 23 was amended to eliminate in 1966. See Am. Pipe, 414 U.S. at 547 ("A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await ... final judgment on the merits in order to determine whether participation would be favorable to their interests.").

can be established under Rule 23(b)(3) if res judicata or subsequent claim preclusion with respect to all members of the class cannot be guaranteed. That is a compelling legal question that warrants this Court's attention and requires immediate resolution.

Prior to the recent In re IPO decision, courts in this Circuit had relied to varying degrees upon this Court's decision in Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975). In that case, decided under the pre-IPO standard, this Court determined that absent foreign shareholders could not be included in a Rule 23(b)(3) opt-out class because, among other reasons, it was a "near certainty" that a foreign court would not recognize an eventual judgment in the U.S. action. Id. at 996.

As the district court itself observed, in the thirty years "[s]ince Bersch, and without the benefit of any further guidance from the Second Circuit", district courts have approached that same superiority determination under Rule 23(b)(3), in cases involving absent foreign claimants, "in a somewhat haphazard way". (Order, 32-33.) That fact is immediately obvious from consideration of the cases in this area, which follow at least three markedly divergent approaches to this issue.

In Cromer Fin. Ltd. v. Berger, 205 F.R.D. 113, 134-35 (S.D.N.Y. 2001), Judge Cote utilized the holding in Bersch to craft a sliding scale of likelihood of preclusion. Recognizing "a distinction [] between those circumstances in which there is a 'possibility' that a foreign court may not recognize a judgment, and those in which there is 'near certainty' that it will not be recognized", Judge Cote found that defendants in Cromer had demonstrated, at most, "a possibility" that a judgment in their favor would have no res

judicata effect abroad as opposed to the "near certainty" required in Bersch, and certified the class. Id.[14]

Other district courts in this Circuit, although citing Bersch with approval, have failed to articulate or apply any explicit test, but seem to have required defendants to reach some threshold below "near certainty". Most notably, in Ansari v. New York University, 179 F.R.D. 112, 116-17 (S.D.N.Y. 1998), Judge Mukasey held that lack of preclusive effect was established (despite defendants' having not submitted any affidavits on the issue of foreign law) because "what limited caselaw there is on this issue suggests that at least six of the prospective class members are residents of countries" that do not give a U.S. judgment preclusive effect. Id. at 117 (emphasis added). Judge Mukasey likewise made no finding of "near certainty" in CL-Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 459-60 (S.D.N.Y. 1989), but nevertheless found that the foreign law in question "would not afford defendants res judicata protection against class members in an 'opt-out' kind of class". Id. at 455; see also In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig., 228 F. Supp. 2d 348, 364 (S.D.N.Y. 2002). Those cases, too, are now inconsistent with the new In re IPO standard. 471 F.3d at 33-36.

Yet other district courts in this Circuit have applied a standard that eschews both Judge Mukasey's and Judge Cote's decisions and is more burdensome on defendants than even Bersch's "near certainty". In In re Lloyd's Am. Trust Fund Litig., No. 96 Civ. 1262, 1998 WL 50211, at *15 (S.D.N.Y. Feb. 6, 1998), Judge Sweet stated that because defendants' affidavits did not "compel the conclusion that a

[14] That approach is now inapposite in light of In re IPO, which has placed the burden of establishing superiority under Rule 23(b)(3) – including the requirement of res judicata now "grafted onto the superiority inquiry" (Order, 36) – squarely on plaintiffs, rather than defendant. In re IPO, 471 F.3d at 33-36.

judgment in the United States would have no value in a foreign court" and observing that "a foreign court may look to the results achieved [in the United States] for guidance", the superiority requirement was satisfied. Id. This very high "no value" standard has since been adopted by at least one other court in this Circuit. See In re Turkcell Iletisim Hizmetler A.S. Sec. Litig., 209 F.R.D. 353, 360 (S.D.N.Y. 2002) (Buchwald, J.) ("[W]e cannot conclude that a Turkish court would give no weight to a judgment of this court.").

Those decisions simply cannot be reconciled, even though the legal question presented was identical.[15] Because of that confusion in the case law – as well as this Court's recent decision in In re IPO – Bersch and its progeny no longer provide courts with "a particularly useful analytical tool". (Order, 36.)

Against that backdrop, the district court's attempt to fashion a new post-Bersch, post-IPO standard for addressing res judicata concerns in the context of a Rule 23(b)(3) superiority inquiry – namely, through using a preponderance of the evidence test to assess the likelihood of claim preclusion under foreign law (see Order, 36-37) – just does

[15] What is more, none of the cases in this Circuit has, to date, provided any direction regarding the relationship between res judicata and the other factors relevant to a Rule 23(b)(3) superiority calculus. Some district courts have treated res judicata as one factor that "must be considered in analyzing th[e] 'superiority' requirement [of Rule 23]", and stated that the refusal of a foreign court to recognize the res judicata effect of a class action only "counsels against a finding that the class action is superior to other forms of litigation". Ansari, 179 F.R.D. at 116-17; see also CL-Alexanders, 127 F.R.D. at 459-60. Still others have characterized the res judicata effect as a relatively insignificant consideration. See Cromer, 205 F.R.D. at 135; see also In re Lloyd's, 1998 WL 50211, at *15-16. Many courts, including one in a different Circuit, have analyzed res judicata concerns as one of several factors relevant to superiority but provide no framework for weighing the significance of the multiple factors considered. See, e.g., In re DaimlerChrysler AG Sec. Litig., 216 F.R.D. 291, 301 (D. Del. 2003); In re Turkcell, 209 F.R.D. at 360.

not work. Not only does it apply the wrong standard to what is a question of law under Federal Rule of Civil Procedure 44.1, it lowers the standard that plaintiffs have to meet in order to establish superiority, in a manner inconsistent with In re IPO.[16] It gives no bright line test – another judge looking at precisely the same foreign law could come to precisely the opposite result.[17]

Moreover, the district court's res judicata determination under Rule 23(b)(3) was premised on its own prior subject matter jurisdiction ruling (see Order, 40-41), which was in turn based only on plaintiffs' jurisdictional allegations, rather than on any actual findings of fact. See In re Vivendi Universal., S.A. Sec. Litig., No. 02 Civ. 5571 (RJH), 2004 WL 2375830, at *6 (S.D.N.Y. Oct. 22, 2004). If In re IPO is to have any weight, and if "some showing" is inadequate to

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[16] The district court's "probability" test is in fundamental conflict with the In re IPO requirement that the "underlying facts . . . relevant to a particular Rule 23 requirement [must be] established", In re IPO, 471 F.3d at 41, because it permits a finding of superiority under Rule 23(b)(3) even when plaintiffs fail to submit conclusive evidence that any judgment will in fact be recognized by foreign courts as binding on absent class members. That suggests there should be an exception to the In re IPO requirements for res judicata, which makes no sense. As a question of law, the question of foreign claim preclusion can and should be briefed by the parties, and decided by the district court, under the new In re IPO standard, at the class certification stage. See Fed. R. Civ. P. 44.1. Where the result is uncertain, under In re IPO it is clear that such uncertainty must weigh in defendants' favor, and against certification. In re IPO, 471 F.3d at 40.

[17] The district court's inconsistent application of its own "probability" test shows how confusing and impossible it is. With respect to French shareholders, the district court concluded "that plaintiffs' experts have shown a probability" that each of four necessary conditions for "exequatur" under French law would be met, and therefore a "judgment in this case would, more likely than not, be granted recognition". (Order, 52 (emphases added)) With respect to German shareholders, however, the district court held that it was "left with the distinct impression that the formalities of German law may well preclude the recognition of a judgment in the instant case". (Id., 30 (emphases added)) There is no bright line (or indeed any real line at all) between these two conclusions.

establish that all Rule 23 requirements have been met, then this Court must make clear that mere allegations cannot be sufficient either.

III. An Appeal Is Warranted Because There Is a Compelling Need for Immediate Resolution of the Novel Legal Questions Presented by This Petition.

The compelling legal questions presented on the first page of this petition are "of fundamental importance to the development of the law of class actions", and are "likely to escape effective review after entry of final judgment". Hevesi, 366 F.3d at 77. An appeal is therefore warranted.

First, the district court's decision threatens to "extend the potentially coercive effect of securities class actions" (id., 80), by encouraging courtless securities class action claims by foreign shareholders, even where there is a significant chance that a judgment will have no preclusive effect overseas. That likelihood is magnified in "an increasingly global economy" where courts are facing these issues with increasing frequency. See Quaak v. KPMG, 361 F.3d 11, 19 (1st Cir. 2004).[18]

Second, an appeal is warranted because the district court's certification of a class of largely foreign shareholders, if left to stand, will place such pressure on Vivendi to settle that it is unlikely that this Court will have an opportunity to

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[18] Investors brought class-action lawsuits against 29 foreign-based companies in U.S. courts last year – more than ever before – representing 14 percent of private investor lawsuits. See Mary Jacoby, For the Tort Bar, A New Client Base: European Investors, Wall St. J., Sept. 2, 2005, at A1. Plaintiffs' firms have been aggressively seeking to file U.S. class actions on behalf of absent foreign claimants, in what "threatens [to be] a barrage of forum shopping by litigants and counsel who seek to create transnational class actions". Richard O. Faulk, Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution, 37 Tort & Ins. L.J. 999, 1001 (2002).

consider the novel and important questions presented here except through a Rule 23(f) appeal. This Court has made clear that "[t]he effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal". Hevesi, 366 F.3d at 80, n.10. That in terrorem effect is maximized here, where the district court's erroneous certification decision substantially increases plaintiffs' potential recovery.[19] Although Vivendi vigorously disputes plaintiffs' factual and legal claims, and prefers to litigate rather than settle this case, the class certification decision "may induce a substantial settlement even if [plaintiffs'] position is weak". Szabo v. Bridgeport Mach., Inc., 249 F.3d 672, 675 (7th Cir. 2001).

Conclusion

For the foregoing reasons, Vivendi respectfully urges this Court to grant this petition.

[19] Indeed, the district court's inclusion of foreign shareholders adds claims relating to roughly 600 million shares, and makes the class almost four times larger than if those foreign claimants were excluded. (Order, 4-5.)

April 9, 2007

Respectfully submitted,

CRAVATH, SWAINE &
MOORE LLP

by
/s/ Paul C. Saunders

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APPENDIX G

MOTION OF VIVENDI, S.A. FOR LEAVE TO ATTACH A LETTER AND BRIEF FROM THE *MINISTÈRE DE LA JUSTICE* OF FRANCE AS EXHIBIT B TO ITS PETITION FOR LEAVE TO APPEAL, PURSUANT TO FED. R. CIV. P. 23(F), FILED APRIL 9, 2007

No. _____

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

In re Vivendi Universal, S.A. Securities Litigation

ON PETITION TO APPEAL FROM AN ORDER ENTERED ON MARCH 26, 2007, BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK GRANTING CLASS CERTIFICATION
02 CIV. 5571 (RJH) (HBP) (S.D.N.Y.)

MOTION OF VIVENDI, S.A. FOR LEAVE TO ATTACH A LETTER AND BRIEF FROM THE MINISTÈRE DE LA JUSTICE OF FRANCE AS EXHIBIT B TO ITS PETITION FOR LEAVE TO APPEAL PURSUANT TO FED. R. CIV. P. 23(F)

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April 9, 2007

Petitioner Vivendi, S.A. ("Vivendi"), respectfully seeks leave of court to attach a letter and brief (and their translations, certified by translator Leila Bose) from the Ministère de la Justice of France ("Ministry of Justice") as Exhibit B to Vivendi's Petition for Leave to Appeal the District Court's Class Certification Order Pursuant to Federal Rule of Civil Procedure 23(f) (the "Petition"). The proposed exhibit is attached hereto as an addendum.

Following the district court's class certification decision, the Ministry of Justice provided Vivendi with a brief setting out its view on the relevant French law on enforcement of U.S.-style class action judgments. That brief will assist the Court in recognizing the extraordinary importance of the legal issues raised by Vivendi's Petition, and therefore the need for clarity and guidance for courts in the United States that will deal with the issues in the future.

The Ministry's brief will also assist the Court in deciding whether the district court's decision is correct in its analysis and application of French law concerning enforcement of a U.S. class action judgment. Indeed, the French Ministry of Justice's brief confirms that an opt-out class action mechanism binding absent French shareholders would be unconstitutional under French law. Given their provenance and obvious relevance to this appeal, Vivendi respectfully requests that the Court grant leave to file the attached letter and brief as Exhibit B to its Petition.

April 9, 2007

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP

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[symbol of France]
Liberty • Equality • Fraternity
FRENCH REPUBLIQUE
MINISTRY OF JUSTICE Paris, [stamp: APRIL 3, 2007]

DEPARTMENT
OF CIVIL MATTERS AND OF THE SEAL

THE DIRECTOR

To the Corporate Secretary,

You have questioned the Chancery regarding a decision handed down on March 22, 2007, by which a New York court allowed in part the petition of shareholders of Vivendi Universal SA seeking to obtain certification of the class action proceeding initiated against this company. The order handed down defines the group as all the persons residing in the United States, in France, in England and in the Netherlands, who acquired Vivendi Universal SA shares between October 20, 2000 and August 14, 2002. You noted that the judge based his decision notably on the strong probability that a French judge may agree to order the exequatur of an American court decision made pursuant to the rules relating to the class action.

As you know, it is not up to the Keeper of the Seals, the minister of justice, to evaluate a decision handed down by a court, let alone when this court is located in a sovereign foreign State, nor to intervene in a dispute between private parties. It is incumbent solely on the parties to determine the grounds of law to be relied upon in support of their interests and to implement the remedies that they deem will be useful and necessary for their case.

Nevertheless, I can present to you the analysis appearing in the attached brief.

As matters stand, since the American court did not rule on the merits of the dispute, this analysis does not therefore permit a prejudgment of the outcome of a potential exequatur procedure.

Sincerely yours,

[signature]
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BRIEF

Subject: Exequatur of a decision handed down by a United States Court at the conclusion of a class action proceeding

The New York court to which was referred the dispute pitting Vivendi Universal SA against some of its shareholders handed down on March 22, 2007, a decision allowing in part the request seeking to obtain certification of the class action proceeding initiated. This order defines the group as all the persons residing in the United States, France, England and the Netherlands, who acquired Vivendi Universal SA shares between October 20, 2000 and August 14, 2002. The judge based his decision notably on the strong probability that a French judge may agree to order the exequatur of an American court decision made pursuant to rules relating to the class action. This analysis presents a question.

In the absence of any international convention regarding recognition of foreign judgments, the general law of the exequatur results from rules established by national jurisprudence. Thus in a decision of February 20, 2007, the Court of cassation ordered that: "In order to grant the exequatur outside of any international convention, the French judge must make sure that three conditions are met, namely, the indirect jurisdiction of the foreign judge, based on the connection of the dispute to the sitting judge, the conformance to international public policy on the merits and on procedure and the absence of fraudulent evasion of the law" (Court of cassation – 1st civil division – February 20, 2007 – Mr. Cornelissen versus Société Avianca Inc., Société North American Air Service Compagny Inc., Société Aerovias Nacionales de Columbia – Appeal No. 05-14.082).

This jurisprudence is transferable to an application for exequatur of a decision from a United States court, inasmuch

as France is not connected by any international convention with this country regarding recognition of court decisions.

As a result, the control of the French judge over a decision of a United States court rendered at the conclusion of a class action should involve three points:

- the international jurisdiction of the foreign judge who rendered the decision;
- the conformance of the order to international public policy;
- the absence of fraudulent evasion of the law.

The first condition of the exequatur relates to the origin of the judgment. Whether or not the order can be effective depends on the nature of the connections with the dispute presented by the State in the name of which the order has been handed down.

In a decision of February 6, 1985, the Court of cassation presented as principle that "the foreign court must be recognized as competent if the dispute is connected in a characterized manner to the country of the judge to which it has been referred and if the choice of jurisdiction was not fraudulent" (Court of cassation – 1st civil division – February 6, 1985 – Mr. Simitch versus Madam Fairhurst – Appeal No. 83-11241). The Court of cassation also held that the competence of the French jurisdiction regarding defendant parties, prescribed by article 15 of the civil code, was only an optional competence, unsuitable to exclude the indirect competence of a foreign court (Court of cassation – 1st Civil division – May 23, 2006 – Mr. Prieur versus Madam de Montenach – Appeal No. 04-12777).

Consequently, the judge to whom the application for authority to enforce a foreign judgment was referred, must verify that a connection exists between the dispute, the plaintiffs and the court to which it is referred and that there is

no fraudulent evasion of the statutory provisions of the law in the choice of this court. In this case, this connection would obviously raise the question over a dispute between a company under French law and its French shareholders.

The second condition relates to compliance with international public policy, which includes certain rules and principles arising from public policy that the judge considers to be so essential that he refuses to give effect to any foreign decision which would infringe upon them.

No request to obtain enforcement for a decision handed down at the outcome of a class action has been made.

A court before which such a request is brought must question how compatible the foreign decision rendered is with international public policy.

The Constitutional Council requires that any person associated with a class action procedure *"has been put in a position to give his consent in full knowledge of the case and that he may maintain the freedom to personally conduct the defense of his interests and to put an end to this action"*. The opt out mechanism established by the class action, which consists in automatically including all of the shareholders involved, in no way meets this requirement and, therefore, does not comply with the constitutional rules established as such. (Decision no. 89-257 DC of July 25, 1989 – Law amending the labor code and concerning the prevention of economic redundancy and the right to conversion).

Furthermore, the preclusive effect associated with a class action decision denies the shareholders any other legal proceedings against the company in question for similar acts. It is also incompatible with this constitutional requirement.

These mechanisms provided for by the New York rules of procedure nevertheless seem to be contrary to the fundamental principles of freedom of access to the judge, to

compliance with the right of both parties to be present and to be heard and to the saying in France according to which *"nobody pleads by proxy"*.

The third condition of the effectiveness of the foreign judgment involves the absence of fraudulent invasion of the statutory provisions of the law. If it appeared that the French shareholders had chosen to plead abroad for the primary purpose of invoking the decision in France, whereas a French court would not have been able to render a decision under the same terms and conditions, this desire to indirectly obtain a decision which could not have been directly obtained from a French court could be construed as avoiding the decision.

Finally, it must be mentioned that nowhere is it contemplated that French law be amended to include rules that are analogous to the mechanism of the American class action. On the contrary, the Bill in favor of the consumer, filed at the National Assembly on November 8, 2006, and not examined by the latter, was based on very different arrangements. It did not in any way include any opt out plan for the foregoing reasons.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Leila Frances Bose, being duly sworn, hereby declare that:

1. I am a translator proficient in the translation of documents from Spanish, French, German, Portuguese and Italian into English.

2. I served until recently as an Adjunct Assistant Professor of Foreign Languages in the Foreign Language Department (Translation Studies Division) of the School of Continuing and Professional Studies at New York University ("NYU"). From 1993 to 2004 I taught a course at NYU in "Introduction to Legal Translation: French to English". From 1996 to 2004 I taught a course at NYU in "Advanced Legal Translation: French to English". I have also acted as an Internship Advisor at NYU from 1986 to the present, assessing translations from French or to French prepared by students seeking to be awarded the qualification of "Certificate of Translation". From 1999 to 2004, I was appointed as one of three faculty nominees to an Advisory Board which reviews this Translation Certificate Program.

3. From 1982 to the present I have been employed as In-House Translator and Coordinator of Translation Services at Cravath, Swaine & Moore, LLP, Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019, U.S.A.

4. I have reviewed the translation from French to English of the document annexed hereto. I confirm that to the best of my knowledge and belief the translation from French to English of this document represents a faithful rendering of the original French language text of this document6. I declare under penalty of perjury that the foregoing is true and correct.

Sworn to before me
this 4 day of April 2007

/s/ Leila Frances Bose
Leila Frances Bose

/s/ Charisse Y. Rodriguez
Notary Public

CHARISSE Y. RODRIGUEZ
Notary Public, State of New York
No. 01RO6145128
Qualified in New York County
Commission Expires May 1, 2010

[symbol of France]
Liberté • Égalité • Fraternité
RÉPUBLIQUE FRANÇAISE
MINISTERE DE LA JUSTICE Paris, le [stamp: 3 AVR. 2007]

DIRECTION
DES AFFAIRES CIVILES ET DU SCEAU

LE DIRECTEUR

Monsieur le Secrétaire général,

Vous avez bien voulu interroger la Chancellerie sur une décision rendue le 22 mars 2007 par laquelle une juridiction new-yorkaise a accueilli pour partie une requête d'actionnaires de la S.A. VIVENDI Universal tendant à obtenir la certification de la procédure de « class action » engagée contre cette société. L'ordonnance rendue définit le groupe comme l'ensemble des personnes demeurant aux Etats-Unis, en France, en Angleterre et aux Pays-Bas, qui ont acquis des actions de la S.A. VIVENDI Universal entre le 20 octobre 2000 et le 14 août 2002. Vous relevez que le juge a notamment fondé sa décision sur la forte probabilité qu'un juge français accepte d'ordonner l'exequatur d'une décision de justice américaine prise en application des règles relatives à le class action.

Comme vous le savez, il n'appartient au Garde des sceaux, ministre de la justice ni de porter une appréciation sur une décision rendue par une juridiction, a fortiori lorsque cette juridiction est située dans un Etat étranger souverain, ni d'intervenir dans un litige entre des parties privées. Il incombe aux seules parties de déterminer les moyens de droit à invoquer au soutien de leurs intérêts et de mettre en oeuvre les voies de recours qu'elles estiment utiles et nécessaires à leur cause.

Néanmoins, je puis vous faire part des éléments d'analyse figurant dans la fiche ci-jointe.

En l'état, la juridiction américaine ne s'étant pas prononcée sur le fond du litige, ces éléments d'analyse ne permettent par conséquent pas de préjuger de l'issue d'une éventuelle procédure d'exequatur.

Je vous prie de croire, Monsieur le Secrétaire général, à l'assurance de mes sentiments les meilleurs.

/s/ Marc Guillaume
Marc GUILLAUME

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FICHE

Objet : Exequatur d'une décision rendue par une juridiction des Etats-Unis à l'issue d'une procédure de class action

La juridiction new-yorkaise saisie du litige opposant la S.A. VIVENDI Universal à certains de ses actionnaires a rendu le 22 mars 2007 une décision accueillant pour partie la requête tendant à obtenir la certification de la procédure de « class action » engagée. Cette ordonnance définit le groupe comme l'ensemble des personnes demeurant aux Etats-Unis, en France, en Angleterre et aux Pays-Bas, qui ont acquis des actions de la S.A. VIVENDI Universal entre le 20 octobre 2000 et le 14 août 2002. Le juge a notamment fondé sa décision sur la forte probabilité qu'un juge français accepte d'ordonner l'exequatur d'une décision de justice américaine prise en application des règles relatives à la class action. Cette analyse pose question.

En l'absence de toute convention internationale en matière de reconnaissance des jugements étrangers, le droit commun de l'exequatur résulte des règles posées par la jurisprudence nationale. C'est ainsi que dans un arrêt du 20 février 2007, la Cour de cassation a considéré que: « Pour accorder l'exequatur hors de toute convention internationale, le juge français doit s'assurer que trois conditions sent remplies, à savoir la compétence indirecte du juge étranger, fondée sur le rattachement du litige au juge saisi, la conformité à l'ordre public international de fond et de procédure et l'absence de fraude à la loi » (Cour de cassation – 1ère chambre civile – 20 février 2007 – M. Cornelissen contre Société Avianca Inc., Société North American Air Service Compagny Inc, Société Aerovias Nacionales de Columbia – Pourvoi n° 05-14.082).

Cette jurisprudence est transposable à une demande d'exequatur d'une décision d'une juridiction des Etats-Unis,

dans la mesure où la France n'est liée par aucune convention internationale avec ce pays en matière de reconnaissance des décisions de justice.

En conséquence, le contrôle du juge français sur une décision d'une juridiction des Etats-Unis rendue à l'issue d'une class action devrait porter sur trois points:

- la compétence internationale du juge étranger qui a rendu la décision;
- la conformité du jugement à l'ordre public international;
- l'absence de fraude à la loi.

La première condition de l'exequatur est relative à l'origine du jugement. Selon la nature des liens présentés avec le litige par l'Etat au nom duquel a été rendu le jugement, celui-ci est ou non susceptible d'efficacité.

Dans un arrêt du 6 février 1985, la Cour de cassation à posé comme principe que « le tribunal étranger doit être reconnu compétent si le litige se rattache d'une manière caractérisée au pays dont le juge a été saisi et si le choix de la juridiction n'a pas été frauduleux » (Cour de cassation – 1ère chambre civile – 6 février 1985 – M. Simitch contre Mme Fairhurst – Pourvoi n° 83-11241). La Cour de cassation considère également que la compétence dc la juridiction française à l'égard des parties défenderesses, édictée par l'article 15 du code civil, n'était qu'une compétence facultative, impropre à exclure la compétence indirecte d'un tribunal étranger (Cour de cassation – 1ère chambre civile – 23 mai 2006 – M. Prieur contre Mme de Montenach – Pourvoi n° 04-12777).

Par conséquent, le juge saisi d'une demande d'exequatur devrait vérifier l'existence d'un lien caractérisé entre le litige, les demandeurs et la juridiction saisie et l'absence de fraude à la loi dans le choix de cette juridiction. En l'espèce, ce lien

poserait à l'évidence question, s'agissant d'un litige entre une société de droit français et ses actionnaires français.

La deuxième condition a trait au respect de l'ordre public international, qui comprend certaines règles et principes relevant de l'ordre public que le juge considère comme tellement essentiels qu'il refuse de donner effet à toute décision étrangère qui les méconnaîtrait.

Il n'a été recensé aucune demande tendant à l'obtention de l'exequatur d'une décision rendue à l'issue d'une class action.

Une juridiction saisie d'une telle demande devrait s'interroger sur la compatibilité de la décision étrangère rendue avec l'ordre public international.

Le Conseil constitutionnel exige que touts personne associée à une demande collective en justice « ait été mis à même de donner son assentiment en pleine connaissance de cause et qu'il puisse conserver la liberté de conduire personnellement la défense de ses intérêts et de mettre un terme à cette action ». Le mécanisme d' « opt out » mis en place par la « class action », qui consiste à inclure automatiquement tous les actionnaires visés, ne répond nullement à cette exigence et, dès lors, n'est pas conforme aux règles constitutionnelles ainsi posées (Décision n° 89-257 DC du 25 juillet 1989 – Loi modifiant le code du travail et relative à la prévention du licencement économique et au droit à la conversion).

En outre, le « preclusive effect » attaché à un jugement de class action interdit toute autre action en justice aux actionnaires pour des faits similaires contre la société en cause. Il est également incompatible avec cette exigence constitutionnelle.

Ces mécanismes prévus par les règles de procédure new-yorkaises paraissent au demeurant contraires aux principes fondamentaux de liberté d'accès au juge, de respect de la

contradiction et à l'adage selon lequel en France « nul ne plaide par procureur ».

La troisième condition de l'efficacité d'un jugement étranger tient à l'absence de fraude à la loi. S'il apparaissait que les actionnaires français avaient choisi d'aller plaider à l'étranger dans le but principal d'invoquer la décision en France, alors qu'une juridiction française n'aurait pu prononcer un jugement dans les mêmes termes, cette volonté d'obtenir indirectement une décision qui n'aurait pu être obtenue directement d'une juridiction française pourrait être constitutive d'une fraude au jugement.

Enfin, il doit être indiqué qu'il n'est nullement envisagé de modifier le droit français pour y inclure des règles analogues au mécanisme de « class action » américain. Au contraire, le projet de loi en faveur des consommateurs, déposé à l'Assemblée nationale le 8 novembre 2006, et non examiné par celle-ci, reposait sur des mécanismes très différents. Il n'incluait en rien un dispositif d'opt out pour les raisons qui précèdent.

APPENDIX H

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF VIVENDI, S.A. FOR LEAVE TO APPEAL PURSUANT TO RULE 23(F) OF THE FEDERAL RULES OF CIVIL PROCEDURE, FILED APRIL 17, 2007

No. 07-1463

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION

On Petition To Appeal From An Order Granting Class Certification Entered On March 26, 2007, By The United States District Court For The Southern District of New York, 02-CIV-5571, Hon. Richard J. Holwell United States District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF VIVENDI, S.A. FOR LEAVE TO APPEAL PURSUANT TO RULE 23(f) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and 29 of the Federal Rules of Appellate Procedure, *amicus* states that The Chamber of Commerce of the United States of America has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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Russell J. Weintraub, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?* 24 BROOK. J. INT'L L. 167 (1998) 4

INTRODUCTION AND INTEREST OF AMICUS CURIAE

This case presents a question of fundamental and ever-increasing importance to the law governing class actions: whether, and under what circumstances, a court may certify a class involving foreign claimants in the face of uncertainty about whether the resulting judgment would be given res judicata effect in the claimants' home countries. This Court has addressed this issue only once, with a glancing reference in a 32-year-old opinion by Judge Friendly. Since then, district courts in this Circuit have divided over how the possibility of foreign non-recognition should bear on class certification. As overseas investors are seeking to participate in American class actions with unprecedented frequency, the time has come for this Court to use its authority under Rule 23(f) to resolve this "unsettled question of law."[1] Prompt appellate review is particularly warranted because the overly lax standard adopted by the district court "would extend the potentially coercive effect of securities class actions"[2]—thereby depriving defendants of vital procedural protections and exacerbating friction between the United States and foreign nations. As the world's largest business federation, whose members are often the targets of class action litigation, the Chamber of Commerce of the United States of America has an acute interest in averting these baleful consequences. That interest occasions this *amicus* brief, which is filed pursuant to Fed. R. App. P. 29(b).

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[1] Fed. R. Civ. P. 23(f) advisory committee's notes.

[2] *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004).

I. WHETHER FOREIGN PLAINTIFFS CAN BE INCLUDED IN A CLASS DESPITE UNCERTAINTY ABOUT RES JUDICATA IS AN ISSUE OF SURPASSING IMPORTANCE.

This is the era of global securities litigation. "More and more, overseas investors are seeking redress in United States courts in federal securities class actions."[3] In 2004 and 2005 alone, 48 foreign companies were sued in securities class actions in the United States; many of these cases, like the present one, involve foreign plaintiffs who purchased securities on foreign markets.[4] And foreign investors moved for lead-plaintiff status in at least 40 U.S. securities fraud class actions between 2002 and 2005.[5] The plaintiffs' bar is doing its utmost to encourage this trend, particularly in Europe, where American lawyers are actively working to recruit investors to participate in class actions in the United States.[6] In part this is because "American securities fraud laws are perhaps the most plaintiff-friendly in the world."[7] There are obvious procedural advantages as well: liberal discovery rules; lawyers working on contingency; the absence of a "loser-pays" cost-shifting regime; the right to a

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[3] Stuart M. Grant & Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions*, 1442 P.L.I. 91, 94 (2004).

[4] Andrew Longstreth, *Coming to America: When Can Foreign Investors Who Brought Shares of Foreign Companies on Foreign Exchanges Sue in the US.?* AMERICAN LAWYER, Vol. 28, No. 11 (Nov. 2006).

[5] Stephanie Schwartz-Driver, *What Do Funds Have to Lose?* INVESTMENT & PENSIONS EUROPE Jan. 2006.

[6] *See* Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, WALL ST. J., Sept. 2, 2005, at A1; Longstreth, *supra*; Schwartz-Driver, *supra*.

[7] Joshua G. Urquhart, *Transnational Securities Fraud Regulation: Problems and Solutions*, 1 CHI. J. INT'L L. 471, 473 (2000).

jury trial.[8] Most relevant here, however, is the availability of the class action, a device that simply does not exist—at least in its American form—in much of the rest of the world. Indeed, "most other countries view American class actions as a Pandora's box that they want to avoid opening."[9]

This distrust of American-style class actions is neither parochial nor ill-considered, but rather is a deliberate policy choice.[10] The prevailing view among European legal experts, for instance, is that "U.S.-style class action litigation" is wasteful, unfair, and fosters an undesirable "litigation—driven society"; accordingly, "Europe neither needs nor wishes to import" this model.[11] Representative adjudication—particularly the "opt-out" class actions permitted by Rule 23(b)(3)—is also at odds with the individualized litigation model that continues to prevail in much of Europe and elsewhere. These countries "believe that the opt-out procedure is a violation of the rights of absent class members."[12] European scholars have also criticized opt-

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[8] *See* Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281, 285, 303 (2006).

[9] Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 403 (2002).

[10] *See* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 9 (2002).

[11] Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 343, 347 (2001).

[12] Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1580 (2005). *See also* Dreyfuss, *supra*, 10 TUL. J. INT'L & COMP. L. at 9 (European view is that American class actions "elude the fundamental concepts that characterize the

out class actions on the ground that they provide plaintiffs' lawyers with "too much leverage that may encourage large corporate defendants to settle 'speculative claims' in the form of 'legal blackmail.'"[13] This unease is both reflected and expressed in the reluctance of many foreign courts to give res judicata effect to American class action judgments.[14] In particular, the "idea that courts can bind a claimant to a legal judgment based upon inaction, particularly when the claimant received notice of the action only through constructive means, is difficult for foreign courts to accept."[15]

It is thus unsurprising that the question whether foreign claimants may be included in a class action even if they may not be bound by an adverse decision has arisen with increased frequency and importance. The growing globalization of securities litigation makes it necessary to have a clear rule for determining when a class may be certified in the face of uncertainty about whether the resulting judgment would be recognized abroad. The only guidance this Court has provided, in the *Bersch* case three decades ago, did not purport to establish a precise or comprehensive standard.[16] The absence of a clear rule has

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formally defined structure of traditional civil litigation," *i.e.*, "individualized litigation").

[13] Grace, *supra*, 15 J. TRANSNAT'L L. & POL'Y at 289.

[14] Because the United States is not party to any relevant treaty requiring foreign states to enforce American judgments, foreign courts often refuse to do so on "public policy" grounds. See Buschkin, *supra*, 90 CORNELL L. REV. at 1577-79. *See generally* Russell J. Weintraub, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?* 24 BROOK. J.INT'L L. 167, 168 (1998).

[15] Buschkin, *supra*, 90 CORNELL L. REV. at 1580.

[16] *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975). Because the affidavits submitted in *Bersch* clearly established that the judgment would not bind the foreign plaintiffs, the Court was able to dispose of the issue merely by observing that "while an

spawned confusion and divergent rulings in the district courts. Given this Circuit's location at the center of the international securities markets and its position as the preeminent forum for large-scale securities litigation, this is undoubtedly a "legal question about which there is a compelling need for immediate resolution" under Rule 23(f).[17]

II. A CLASS INVOLVING FOREIGN PLAINTIFFS MAY NOT BE CERTIFIED IF THERE IS ANY REALISTIC POSSIBILITY THAT THE JUDGMENT WOULD NOT BIND ALL CLASS MEMBERS.

The district court here held that certification is permissible so long as "plaintiffs are able to establish a *probability* that a foreign court will recognize the res judicata effect of a U.S. class action judgment."[18] That standard is inadequate to safeguard the vitally important interests at stake when classes involving foreign claimants are certified. Instead, the appropriate standard should preclude certification under Rule 23(b)(3) when the court finds that there is ***any significant possibility*** that a judgment involving foreign class members would not be treated as binding in those members' home countries. In other words, certification may be granted *only* where there is no realistic chance that the class judgments would fail to bind the entire class. This rigorous standard is required for a number of reasons, but here we focus on two: (1) the foundational importance to class action litigation of res judicata, a principle that

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American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a near certainty." *Id.* at 996.

[17] *Hevesi*, 366 F.3d at 76.

[18] *In re Vivendi Universal, S.A. Securities Litig.*, 2007 WL861147, at *18 (S.D.N.Y. Mar. 22, 2007) (Order at 37) (emphasis added).

ultimately implicates the requirements of due process; and (2) the need for U.S. courts to respect their foreign counterparts and avoid unnecessary international disharmony.

First, although class certification presents defendants with a number of serious risks,[19] it carries with it one crucial benefit: "class certification 'p ɔvides a single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protects *the defendant* from inconsistent adjudications."[20] The "consistency," "finality," and "repose" that class certification promises defendants "derives from the fact that the class action is binding on all class members."[21] Indeed, Rule 23 was crafted precisely to ensure that this was so. Recognizing that "it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one," the advisory committee amended the rule in 1966 "to assure that members of the class * * * would be bound by all subsequent orders and judgments."[22]

As the Supreme Court has recognized, therefore, a defendant "would be obviously and immediately injured if [a] class-action judgment against it became final without

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[19] These risks are well documented. *See, e.g., Hevesi*, 366 F.3d at 80-81; *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

[20] *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 427 (4th Cir. 2003) (quoting 5 MOORE'S FEDERAL PRACTICE § 23.02 (3d ed. 1999)).

[21] *Id. See also* NEWBERG ON CLASS ACTIONS § 5:38 (4th ed. 2006) (the "objective" of "a unitary adjudication" is achieved because "the final judgment, whether favorable or adverse to the class, will be binding on the entire class"); *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 310 (3d Cir. 2005).

[22] *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974).

binding the plaintiff class."[23] Such injury results not only where the court lacks personal jurisdiction over the class members (as alleged in *Shutts*), but also where the jurisdictions in which certain class members reside may refuse to recognize the judgment. In both scenarios, the defendant "could be subject to numerous later individual suits by these class members," and thus faces all of the considerable burdens of class litigation, without any of the corresponding benefits.[24] A rule that allows a class to be certified despite significant uncertainty about whether the resulting judgment will bind the entire class simply fails to respect the basic bargain that justifies class actions in the first place.

Such a lax standard also gives an undeserved windfall to foreign claimants. Freed from the effects of res judicata, foreign class members would enjoy the fruits of victory, but would not feel the sting of defeat. This "heads I win, tails you lose" approach turns the class certification process on its head. As this Court has recognized, "if defendants prevail against a class they are *entitled* to a victory no less broad than a defeat would have been."[25] The objective of a class action is to *resolve* large number of claims in a single proceeding; it is not to give foreign claimants a free and non-binding shot at extracting money from a defendant.

Indeed, so deeply rooted is res judicata that jettisoning this basic protection for class action defendants would raise serious due process problems.[26] At common law, res judicata

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[23] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985).

[24] *Id.*

[25] *Bersch*, 519 F.2d at 996 (emphasis added).

[26] *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("[A]brogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause.").

was "a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts."[27] Over a century ago, the Court described the "maxim" in civil cases that "no man shall be twice vexed for one and the same cause,"[28] observing that there are "no maxims of the law more firmly established, or of more value in the administration of justice."[29] Thus it is that an owner of property "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment."[30] Due process similarly protects defendants from being "vexed" by a suit that fails to provide sufficient guarantees that victory will provide finality and repose.[31] To subject a defendant to class litigation without clear assurances that any judgment rendered will be a "good bar to an action"[32] impermissibly abandons these established principles and is inconsistent with both Rule 23 and the Due Process Clause.

Second, allowing U.S. courts to certify classes involving claimants whose home countries may decline to enforce the judgment exacerbates the tensions that already exist as a result of the broad extraterritorial application of

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[27] *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917)). *See also Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931).

[28] *Ex parte Lange*, 85 U.S. 163, 168 (1873).

[29] *United States v. Throckmorton*, 98 U.S. 61, 65 (1878).

[30] *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961).

[31] *See* Janet Walker, *Crossborder Class Actions: A View From Across the Border*, 2004 MICH. ST. L. REV. 755, 763.

[32] *Lange*, 85 U.S. at 168-69.

American law.[33] In refusing to give preclusive effect to U.S. class action judgments, foreign courts see themselves as protecting the interests of their own citizens, who may not even have known that they were party to the litigation. At the same time, those courts are resisting American efforts to export this controversial procedural device to a legal system that has consistently and studiously eschewed it.[34]

When an American court fails to heed these concerns, therefore, it puts its foreign counterparts in an awkward dilemma. If the foreign court recognizes a judgment against the class, it would undermine principles fundamental to its own legal system and jeopardize the rights of its citizens to their day in court. If the foreign court refuses to recognize the judgment, however, its decision would unfairly expose the prevailing defendant to repeated litigation and strip away the benefits that are supposed to result from class adjudication. Foreign courts thus would be forced to choose between *taking offense* at being asked to sacrifice established procedural protections for their nationals and *giving offense* by rejecting the validity of a judgment duly entered by an American court. Either way, certifying a class in the face of significant uncertainty about whether the judgment will be given preclusive effect abroad ensures unfairness and contributes to international discord. Principles of comity—

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[33] *E.g.*, Russell Du Puy, *International Cooperation in Securities Enforcement*, 46 WASH. & LEE L. REV. 713, 720 (1989) ("Many foreign states view any effort to apply United States laws beyond United States borders as a violation of the foreign state's sovereignty and as an improper effort to export American economic, social, and judicial values."); Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U.L. REV. 523, 523-24 (1993) (applying U.S. securities laws abroad "has offended the sovereignty of other countries which have reacted by passing retaliatory legislation of their own").

[34] *See* Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 74 (2003).

the "spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states"[35] —demand greater consideration and respect. The surest way to prevent these problems is to make clear that Rule 23 forbids a class with foreign claimants from being certified when there is any significant possibility that the judgment would not be fully recognized abroad.

Dated: April 17, 2007

Respectfully submitted,

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[35] *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987).

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2007, I caused copies of the foregoing Brief of the Chamber of Commerce of the United States As *Amicus Curiae* in Support of the Petition for Leave to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) to be served by First Class United States Mail, postage prepaid, on the following:

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APPENDIX I

DEFENDANT VIVENDI, S.A.'S RESPONSE TO PLAINTIFF CAPITAL INVEST'S MOTION AND PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(F), FILED APRIL 24, 2007

No. 07-1419

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION

ON PETITION TO APPEAL FROM AN ORDER
ENTERED ON MARCH 26, 2007,
BY THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
GRANTING CLASS CERTIFICATION
02 CIV. 5571 (RJH) (HBP) (S.D.N.Y.)

DEFENDANT VIVENDI, S.A.'S RESPONSE TO PLAINTIFF CAPITAL INVEST'S MOTION AND PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

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Fed R. App. P. 26.1 Disclosure Statement

Vivendi, S.A., sued herein as Vivendi Universal S.A., is a publicly held corporation with no parent company. No publicly held company owns 10 percent or more of Vivendi, S.A.'s stock.

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In re Vivendi Universal, S.A. Sec. Litig., 02 Civ. 5571 (RJH) (HBP) (S.D.N.Y.) 1

Statutes and Rules

Fed. R. Civ. P. 23(f) 1

Vivendi, S.A. ("Vivendi") respectfully submits this response to the Motion and Petition of Capital Invest, die Kapitalanlagegesellschaft der Bank Austria Creditanstalt Gruppe GMBH ("Capital Invest" or "CI") for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f), dated April 5, 2007, No. 07-1419 ("CI Pet."). On April 9, 2007, Vivendi filed its own Petition for Leave to Appeal Pursuant to Fed. R. Civ. P. 23(f), ("V Pet."), No. 07-1463.[1]

Argument

Parties on both sides of this litigation have filed Rule 23(f) petitions, agreeing that this Court should review the question of the appropriate standard to apply in class certification determinations involving absent foreign claimants.[2] Not surprisingly, the parties have dramatically different views as to how that question should be addressed. The fact that such wide differences exist, however, only underscores the need for this Court to address the fundamental issues raised by the petitions.

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[1] Both petitions seek leave to appeal the district court's class certification Memorandum Opinion and Order in In re Vivendi Universal, S.A. Sec. Litig., 02 Civ. 5571 (RJH) (HBP) (S.D.N.Y.) (hereinafter "Order", attached to V Pet. as Exhibit A).

[2] We acknowledge that the circumstances of CI's petition, which was filed by Motley Rice LLC ("Motley"), is somewhat unusual. The petition purports to speak for the "putative class members from multiple countries" excluded from the class. (CI Pet. at 8.) Motley, however, is neither lead nor class counsel and has no authority to represent those excluded claimants. See In re Merck & Co., Inc. Sec. Litig., 432 F.3d 261, 266 (3d Cir. 2005). Moreover, as lead counsel did not sign the petition, there is no evidence that lead counsel "farmed out" or delegated this work to Motley. See, e.g., Bell v. Ascendant Solutions, Inc., No. 04-3298, 2002 WL 638571, at *6-7 (N.D. Tex. April 17, 2002); Vincelli v. Nat'l Home Health Care Corp., 112 F. Supp. 2d 1309, 1315-16 (M.D. Fla. 2000). However, if CI retained Motley because it believes that lead counsel or the class representatives do not adequately represent its interests, that is an entirely separate matter that goes to whether plaintiffs have met the Rule 23 requirements.

First, both parties agree that this Court should address the impact of res judicata on class certification determinations involving absent foreign claimants. (V Pet. at 8-13, 19-20; CI Pet. at 15-18.) There is disagreement as to the role res judicata plays in such determinations. Relying on the Supreme Court's decision in Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984), Vivendi's position is that res judicata is central to Rule 23 class actions. (V Pet. at 8-11 (quoting Cooper, 467 U.S. at 874 ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.")).) The district court's "more likely than not" standard (Order, 37, 59) will result in rulings, as was the case here, that are fundamentally inconsistent with the intended operation of the class action mechanism. (See V Pet. at 8-13.) Capital Invest, on the other hand, seeks to minimize the res judicata question even beyond the district court's approach, to be but one factor, among many, to be considered in a Rule 23 analysis. (See CI Pet. at 15-18.) But regardless of the merits of those conflicting positions, the parties plainly agree that the precise impact res judicata has on class action determinations involving absent foreign claimants needs to be resolved.

Second, Vivendi and CI, albeit under different theories, contend that the law with regard to Rule 23(b)(3) superiority analyses needs to be clarified. (See V Pet. at 8-13, 17-19; CI Pet. at 9-13.) CI argues that the district court's "more likely than not" standard (Order, 37, 59) is a "stunning departure" from the "near certainty" test set forth in Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975), which, according to CI, "has enjoyed hegemony, across contexts and jurisdictions, for approximately thirty years". (CI Pet. at 9.) CI's "hegemony", however, is based in large measure on district court cases in other circuits (see id. at 10-13), some of which apply a "near certainty" test to determinations of

subject matter jurisdiction, not class certification,[3] and others of which do not even apply a "near-certainty" test.[4]

Vivendi, on the other hand, argues that no such "hegemony" exists, and that district courts have interpreted Bersch and its progeny in fundamentally different ways. (See V Pet. at 14-19 (citing, e.g., In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig., 228 F. Supp. 2d 348, 364 (S.D.N.Y. 2002); In re Lloyd's Am. Trust Fund Litig., No. 96 Civ. 1262, 1998 WL 50211, at *15 (S.D.N.Y. Feb 6, 1998); Ansari v. New York Univ., 179 F.R.D. 112, 116-17 (S.D.N.Y. 1998); CL-Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 459-60 (S.D.N.Y. 1989)).) Indeed, the district court itself characterized the existing case law as "haphazard" and no longer "a particularly useful analytical tool". (Order, 32, 36.) Again, whatever the standard, litigants should be able to know what test is going to be applied in the context of certification of putative non-U.S. classes.

Third, parties on both sides take issue with whether the district court properly applied this Court's recent decision in In re Initial Public Offering Securities Litigation, 471 F.3d 24 (2d Cir. 2006) ("In re IPO"), in this context. (See V Pet. at 8-13, 17-19; CI Pet. at 13-14.) Vivendi believes that In re IPO requires plaintiffs to demonstrate "actual, not presumed" conformance with each Rule 23 requirement by establishing the "underlying facts" relevant to each requirement. In re IPO, 471 F.3d at 33-34. Thus, according to Vivendi, the district court's newly-fashioned "more likely than not" test (Order, 37, 59) is inconsistent with In re IPO because it permits a finding of superiority under Rule 23(b)(3) even

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[3] See CI Pet. at 11 n.2 (citing In re Royal Dutch/Shell Transport Sec. Litig., 380 F. Supp. 2d 509, 546-47 (D.N.J. 2005); In re Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 756-59, 762-66 (E.D. Va. 2004)).

[4] See CI Pet. at 10-11 (citing In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig., 209 F.R.D. 353, 360-61 (S.D.N.Y. 2002); Frietsch v. Refco, Inc., No. 92 C 6844, 1994 WL 10014, at *11 (N.D. Ill. Jan. 13, 1994)).

when plaintiffs fail to establish that a judgment will be recognized by foreign courts as binding upon absent class members. (See V Pet. at 17-19.) To the contrary, CI takes the position that the district court interpreted In re IPO improperly to shift the burden to plaintiffs to show that a foreign jurisdiction will give res judicata effect to a U.S. judgment. To bolster that contention, CI claims that In re IPO stands "for the uncontroversial assertion that Plaintiffs have the burden to produce some evidence of compliance with Rule 23".[5] (CI Pet. at 14 (emphasis added).) Once again, regardless of whether Vivendi or CI is correct, both parties appear to agree that the question of In re IPO's effect merits immediate review.

* * * *

In light of the foregoing, Vivendi believes that the questions this Court should address are: whether absent foreign claimants who may not be precluded by a judgment or settlement in a U.S. class action from suing the same defendants again in foreign jurisdictions can properly be included in a class certified under Rule 23; and if a judgment or settlement in a U.S. class action may not be given res judicata effect against a vast majority of class members, whether plaintiffs can still satisfy the superiority requirement of Rule 23(b)(3) under the standard specified by this Court in In re IPO. (See V Pet. at 1.) CI's much narrower framing of the question presented, asking this Court to determine whether the district court erred in excluding Austrian and German class members as well as shareholders from countries other than England, France, the Netherlands and the United States, is not appropriate. (See CI Pet. at 1-2.) That

[5] In fact, the In re IPO decision explicitly repudiated the "some showing" standard promulgated by prior case law. In re IPO, 471 F.3d at 33 ("[T]he important point is that the requirements of Rule 23 must be met, not just supported by some evidence.").

question is neither novel nor compelling.[6] Moreover, under any standard, the answer to that question is no. With regard to Austria, the parties' experts agree that "there must be formal reciprocity between the foreign state and the Republic of Austria as a condition to recognition of a foreign judgment" and that such reciprocity does not exist with the U.S. (Order, 58 (internal quotation marks omitted).) In essence, an Austrian court would have to find well-established Austrian law unconstitutional in order to give a judgment preclusive effect. (Id.) Similarly, with respect to Germany, the district court concluded that plaintiffs did not show even "a probability that German courts will give res judicata effect to a judgment in this case". (Id.) Separately, with regard to absent foreign claimants from countries other than Austria and Germany, plaintiffs offered no evidence to support their inclusion, failing to carry their burden under In re IPO.

[6] CI argues that the district court's class definition sounds the "death knell" for excluded shareholders because the district court's ruling "effectively terminates the litigation" for "members of the putative class excluded by the district court's ruling". (CI Pet. at 8-9 (internal quotation marks omitted).) That proves too much. CI's argument would permit a 23(f) appeal of a questionable decision in any case where the district court certified a class narrower than that proposed by plaintiffs. In actuality, the "death knell" doctrine is intended to address "the possible case-ending effect of an imprudent class certification decision", as opposed to the termination of certain individuals' interests in the action. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 165-67 (3d Cir. 2001); see also In re Sumitomo Copper Litig., 262 F.3d 134, 138 (2d Cir. 2001).

Conclusion

Vivendi respectfully requests that this Court accept Vivendi and CI's petitions and consolidate the appeals, so that it can address immediately the novel and compelling issues more appropriately framed by Vivendi's petition.

April 24, 2007

Respectfully submitted,

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APPENDIX J

ANSWER OF CLASS PLAINTIFFS TO THE PETITIONS FILED PURSUANT TO FED. R. CIV. P. 23(F) FOR LEAVE TO APPEAL FROM THE DISTRICT COURT'S CLASS CERTIFICATION ORDER, FILED APRIL 27, 2007

No. 07-1463

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION

On Petition to Appeal from an Order Entered on March 23, 2007
by the United States District Court for the Southern District of New York
Granting Class Certification
02 Civ. 5571 (RJH) (HBP) (S.D.N.Y.)

ANSWER OF CLASS PLAINTIFFS TO THE PETITIONS FILED PURSUANT TO FED. R. CIV. P. 23(f) FOR LEAVE TO APPEAL FROM THE DISTRICT COURT'S CLASS CERTIFICATION ORDER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Retirement System for General Employees of the City of Miami Beach, class representative herein, states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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Class Plaintiffs respectfully submit this answer to the Rule 23(f) petitions filed in connection with the March 22, 2007 Memorandum Opinion and Order by District Judge Richard J. Holwell granting partial class certification (referred to below as the "*Order*").

I. Introduction

Vivendi's primary argument for seeking immediate appellate review is that Judge Holwell's certification of a class that includes stock purchasers from France, England and the Netherlands violates Vivendi's "fundamental due process" rights since plaintiffs have not demonstrated that Vivendi is "*guaranteed*" subsequent claim preclusion with respect to class members from those countries. *E.g.*, Vivendi's Petition (referred to below as "*Pet.*") at 10, 14 (emphasis added).[1]

In fact, although Vivendi repeatedly acknowledged before the District Court that the burden was on *defendants* to show to a "*near certainty*" that a foreign court would not recognize an eventual judgment in this class action (*see* Order at 30 (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975))), Vivendi *now* claims that the Second Circuit's decision in *In re Initial Public Offering Securities Litigation*, 471 F.3d 24, 41 (2d Cir. 2006) "fundamentally altered the law in this area" so that *plaintiffs* are now required to "submit *conclusive* evidence that any judgment *will in fact* be recognized by foreign courts" (Pet. at 4, 18) (emphasis added).

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[1] Defendants Jean-Marie Messier and Guillaume Hannezo have filed separate petitions adopting and incorporating by reference the arguments set forth in Vivendi's Petition.

Vivendi's position is both extreme and untenable.[2] Indeed, as set forth below, there are a number of reasons why the Court should reject Vivendi's arguments, including:

- Vivendi has waived its current argument that the appropriate res judicata standard is "absolute" certainty because it never raised this point at the District Court level despite ample opportunity to do so. In fact, Vivendi's class certification briefs explicitly accepted *Bersch* as the standard -- i.e., a more lenient standard (for plaintiffs) than the one adopted by Judge Holwell. Vivendi then made a supplemental class certification submission to the District Court in January 2007 discussing *IPO* but never once suggesting that the case "fundamentally altered" the law concerning res judicata. *Infra* at 14-15.

- Vivendi's "absolute" certainty standard has never been adopted by any court -- which is not surprising since that would be contrary to years of class action jurisprudence and would essentially require dismissal of any class action that included foreigners as absent class members if there was a mere possibility (*no matter how remote*) that a foreign court may not give preclusive effect to the US court's judgment. The full logical consequence of Vivendi's position would be that, in a case against a multinational corporation, even Americans would have to be excluded from the class unless they could show that courts in every

[2] A Rule 23(f) petition has also been filed by plaintiff Capital Invest, Die Kapitalanlagegesellschaft Der Bank Austria Creditanstalt Gruppe GMBH (*Capital Invest*). Capital Invest contends that the District Court erroneously rejected the *Bersch* "near certainty" test. Class Plaintiffs believe that the expert affidavits they submitted below concerning German and Austrian law supported class certification under either standard -- whether under *Bersch*, or the "more likely than not" standard adopted by the District Court.

country where the corporation could be sued would preclude relitigation of a claim covered by a class judgment in the US court. *Infra* at 16-19.

- Vivendi severely overstates its risk of double jeopardy. In fact, after full consideration of the volumes of evidence presented by both sides on the risk of nonrecognition of a US judgment abroad, Judge Holwell tended to agree with plaintiffs' well-regarded experts and concluded that it is "more likely than not" that the courts in France, England and the Netherlands "*would* recognize the enforceability of a judgment or settlement in the present case." *Infra* at 20.

- The "absolute" certainty standard that Vivendi insists must be applied to protect its due process rights is clearly outweighed by the fact that US courts have a significant interest in advancing the federal policy of deterring foreign defendants from using the US as a base from which to violate the federal securities laws (as Vivendi has done in this case). *Infra* at 21.

- In view of the fact that the likelihood of re-litigation by foreign investors in foreign courts is extremely small, it would be unjust to block foreign investors from this class action entirely, just to protect a defendant from the remote theoretical possibility that they (after having initially declined to opt out) might pursue a "second bite at the apple" by suing in non-US courts. *Infra* at 22-24.

Moreover, Vivendi has not satisfied either prong of the test for discretionary Rule 23(f) appeals in this Circuit. *See infra* at 13. With respect to the first prong, Vivendi has not shown "that the certification order will effectively terminate the litigation," nor has Vivendi made a "substantial showing" that the District Court's decision is "questionable" –

particularly given the fact that Judge Holwell fully considered all the relevant case law (including the Second Circuit's recent decision in *IPO),* as well as a multitude of evidentiary submissions from the parties (*including a combined 14 expert declarations on the res judicata issue alone*). Thus, consistent with *IPO,* the District Court clearly "receive[d] enough evidence, by affidavits, documents, or testimony, to be satisfied that [the superiority] requirement has been met." *IPO*, 471 F.3d at 41.

Vivendi has also failed to meet the second prong for Rule 23(f) review since the District Court's order does not implicate a legal question about which there is a compelling need for immediate resolution. The Second Circuit has stated that "a novel legal question will *not* compel immediate review unless it is of fundamental importance to the development of the law of class actions *and* it is likely to escape effective review after entry of final judgment." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001) (emphasis added). As set forth below, Vivendi's petition has not raised any substantial issues concerning the superiority of this class action.[3]

In sum, Vivendi's shrill approach to seeking immediate appellate review is not surprising since it clearly does not want investors from France, England and the Netherlands to have an effective remedy to seek compensation for the damages they suffered as a result of defendants' massive securities fraud (much of which occurred in the US, *see infra* at 5-7, 9-10, 21). In fact, as set forth below, Vivendi has already been unsuccessful *twice* in trying to eliminate foreign purchasers from this case on grounds of subject matter jurisdiction. *Infra* at 9-10. Thus, Vivendi's petition should be

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[3] Vivendi's argument that the inclusion of foreign purchasers in the class will force it to settle (Pet. at 20) does not distinguish this case from any other certification of a large class, and does not provide grounds for Rule 23(f) review.

viewed with serious skepticism, particularly since it is now contending that Judge Holwell abused his discretion by imposing a standard that is actually *higher* than the one repeatedly advanced by *Vivendi* below – i.e., Judge Holwell held that *plaintiffs* must show that foreign court recognition is "*more likely than not*," rather than it being (as Vivendi argued) the *defendant's* burden to show *a near certainty* of nonrecogntion. It is not necessary to determine whether the District Court's departure from *Bersch* was appropriate since, under either standard, Vivendi's position is without merit.[4]

Accordingly, the Court should deny Vivendi's petition.[5]

II. Factual Background

Plaintiffs assert federal securities claims against Vivendi and two of its most senior former officers: Jean-Marie Messier (former CEO) and Guillaume Hannezo

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[4] Judge Holwell's "more likely than not" standard obviously reflects traditional evidentiary standards in civil cases, as well as the Second Circuit's statements in IPO that "Rule 23(b)(3)'s predominance requirement cannot be shown by less than a preponderance of the evidence." IPO, 471 F.3d at 37 (citing *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 233 (2d Cir. 2006)).

[5] Even though the issues raised in Vivendi's petition essentially relate to foreign plaintiffs and foreign defendants, the *United States* Chamber of Commerce has submitted an amicus brief in support of Rule 23(f) review. However, despite the extraordinary assertion that Judge Holwell's decision will "deprive[e] defendants of vital procedural protections and exacerbate[e] friction between the United States and foreign nations" *(see* US Chamber Pet. at 1), the fact is, the US Chamber is simply crystal gazing since there are *no* foreign decisions rejecting US class action judgments. Moreover, the US Chamber's assertion that there is a "reluctance of many foreign courts to give res judicata effect to American class action judgments" is disingenuous since the source it relies on does not cite a single foreign court decision that refuses to grant enforcement of a US class action judgment, and there are none. *See* Ilana T. Buschkin, "The Viability of Class Action Lawsuits in a Globalized Economy -- Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts," 90 CORNELL L. REV. 1563, 1577-79 (2005).

(former CFO). Specifically, plaintiffs allege that from 2000 through 2002, Vivendi transformed itself from a small French water utility into an international media and telecommunications conglomerate by acquiring a number of companies (including many in the US). During that time, plaintiffs contend that Vivendi employed multiple accounting and financial manipulations at its US and foreign subsidiaries that falsified Vivendi's financials (e.g., revenue, earnings and asset valuations) and concealed a mounting liquidity crisis at the company. The results were a staggering drop in Vivendi's stock price (a near-total collapse of 85% from its inflated high), government investigations in both the US and France, and a number of lawsuits, including this class action and a breach of contract/securities fraud case filed by Liberty Media Corporation arising from Vivendi's acquisition of USA Networks in December 2001 – which have been consolidated for pre-trial purposes before Judge Holwell.

Plaintiffs contend that defendants' public statements during the *Class Period* (October 30, 2000-August 14, 2002) were materially false and misleading for a number of reasons, including:

- Vivendi failed to disclose that it utilized purchase accounting reserves at a number of its subsidiaries (including *Universal Music Group* and *Universal Studios* here in the United States) in order to meet pre-determined earnings targets, which inflated the company's EBITDA by *hundreds of millions of dollars* during the Class Period.

- Vivendi failed to disclose material contingent liabilities, including billions of dollars in obligations arising from its investments in two telecom companies (*Cegetel* in France and *Maroc Telecom* in Morocco).

- Vivendi violated Generally Accepted Accounting Principles by fully consolidating the financial results of Cegetel and Maroc Telecom (both of which were major sources of Vivendi's earnings and cash flow), even though Vivendi did not have control over these subsidiaries.

- Vivendi improperly concealed its majority ownership interest in a Polish telecom company (*Telco*) because Vivendi knew that credit rating agencies and securities analysts would react negatively to the financial implications of Vivendi's acquiring a majority interest in that entity.

- Vivendi failed to timely write-down billions of dollars in overvalued assets from previous investments, including its acquisition of US Filter (which was Vivendi's largest environmental asset in the United States).[6]

As mentioned above, Vivendi has been the subject of a number of investigations in both the US and France concerning the same wrongful conduct at issue in this class action. For example, a year and a half after plaintiffs filed this action, the SEC filed a complaint alleging that Vivendi, Messier and Hannezo committed securities fraud by engaging in "improper practices that produced materially false and misleading EBITDA results and/or concealed

[6] Plaintiffs also allege that Vivendi had a substantial motive to increase its share price so that it could acquire a number of companies (many of which were in the US) using tens of billions of dollars' worth of artificially inflated Vivendi ordinary shares and ADSs as currency. In addition, Vivendi had placed a $1 billion-plus wager on whether its shares would rise by selling put options on tens of millions of Vivendi shares. As such, Vivendi had an additional incentive to keep its shares at artificially inflated prices, because if Vivendi's share price fell it would cost the company as much as $1.4 billion and potentially drive Vivendi over the edge into bankruptcy.

Vivendi's true financial condition." *See* Complaint in *SEC v. Vivendi,* No. 03-CV-10195 (PKC) (S.D.N.Y. Dec. 23, 2003). The SEC action was settled based on, among other things, Vivendi's agreement to pay a $50 million civil penalty and Messier's agreement to relinquish his claim to a €21 million severance package. Notably, according to the distribution plan proposed by the SEC (which was recently approved by District Judge P. Kevin Castell), the $50 million settlement will be distributed to both purchasers of Vivendi ordinary shares and purchasers of Vivendi ADSs, *without regard to whether they reside in the US or abroad. See* Order at 66 n.22.[7]

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[7] The French *Commission des opérations de Bourse* (*COB*) began a separate investigation into Vivendi's accounts in July 2002. This investigation concluded on November 3, 2004 when the *Autorité des marchés financiers* or *AMF* (successor to the COB) issued a sanction ruling against Vivendi, Messier and Hannezo for, among other things, reporting deceptive financial information from 2000 to 2002, and inaccurately reporting Vivendi's indebtedness, earnings and cash position. Vivendi and Messier were each fined €1 million. In June 2005, the Paris Court of Appeals reduced the fines against Vivendi and Messier but, importantly, it upheld that portion of the AMF's decision finding that Vivendi and Messier published deceptive financial communications regarding Vivendi's debt levels and reported inaccurate cash flow figures in its financial results. The Court of Appeals' decision on these points was upheld by France's highest court (the *Cour de Cassation*) in December 2006. In addition, in July 2002, the French Public Prosecutor's office commenced a criminal investigation relating to Vivendi's accounts. These proceedings are essentially conducted in secret, but Vivendi has publicly stated that the initial indictment specified "potential crimes relating to the presentation and publication of inaccurate, untrue and unfaithful accounts for Vivendi Universal for the 2000 and 2001 fiscal years; the distribution of sham dividends by Vivendi Universal for the 2001 fiscal year; and the public distribution of false or deceptive information concerning Vivendi Universal's condition and future prospects" (*see* Vivendi's 2002 Form 20-F, dated June 30, 2003, at 131) — all of which are also at issue in this class action. The French criminal investigation is ongoing.

III. Procedural Background

A number of class action complaints were filed in July 2002, shortly after Messier was forced to resign and after Vivendi's new management admitted that the company was experiencing a serious liquidity issue. On November 1, 2002, District Judge Harold Baer, Jr. appointed co-lead plaintiffs and approved their selection of co-lead counsel.

Shortly thereafter, on January 7, 2003, plaintiffs filed their Consolidated Class Action Complaint. Each of the defendants moved to dismiss the complaint, primarily arguing that plaintiffs did not adequately allege subject matter jurisdiction. On November 3, 2003, with some minor exceptions, Judge Baer denied defendants' motions to dismiss and upheld plaintiffs' claims under Section 10(b) and 20(a) of the Securities Exchange Act of 1934 and Sections 11 and 12(a)(2) of the Securities Act of 1933.[8] Notably, Judge Baer held that the court had subject matter jurisdiction over the claims brought by foreign purchasers:

> Contrary to defendants' characterization, their conduct can hardly be deemed merely preparatory within the United States. Given Messier's and Hannezo's decision to move to the United States, allegedly to better direct corporate operations and more effectively promote misleading perceptions on Wall Street . . . one can reasonably infer that the alleged fraud on the American exchange was a "substantial' or 'significant contributing cause of [foreign investor's] decision[s] to purchase [Vivendi's] stock" abroad.[9]

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[8] Judge Baer granted Hannezo's motion to dismiss plaintiffs' Section 12(a)(2) claim. Plaintiffs' Section 12(a)(2) claims against Vivendi and Messier remain.

[9] *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 169-70 (S.D.N.Y. 2003) (citing *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122

One month after Judge Baer's decision on the motions to dismiss, the consolidated cases were transferred to Judge Holwell. Defendants (not surprisingly) immediately tried to take advantage of the situation and asked Judge Holwell to reconsider Judge Baer's subject matter jurisdiction rulings. However, Judge Holwell concluded that there was no basis for disturbing Judge Baer's decision and denied the motions for reconsideration in their entirety. *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571, 2004 WL 2375830 (S.D.N.Y. Oct. 22, 2004) (reconsideration denied because Vivendi's two principal actors, Messier and Hannezo, moved their operations to NY and spent at least half their time managing the company from the US during a critical part of the Class Period).

Plaintiffs filed their motion for class certification in October 2004. On July 15, 2005, plaintiffs filed a substituted class certification motion because, after many months of class discovery by defendants, certain proposed representatives decided they no longer wished to be involved in the litigation. In their motion, plaintiffs sought certification of a class that included all persons who purchased or acquired Vivendi ordinary shares or ADSs between October 30, 2000 and August 14, 2002 (referred to below as the *Class*).

The primary argument raised by defendants in opposition to class certification was that, under the Second Circuit's decision in *Bersch*, foreign purchasers must be excluded from the Class because it was a "near certainty" that defendants would not be able to assert claim preclusion

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(2d Cir. 1995); *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 130-31 (2d Cir. 1998); *S.E.C. v. Princeton Econ. Int'l, Ltd.*, 84 F. Supp. 2d 452, 454 (S.D.N.Y. 2000); *In re Gaming Lottery*, 58 F. Supp. 2d 62, 73 (S.D.N.Y. 1999); *Leonard v. Garantia Banking Ltd.*, No. 98 Civ. 4848, 1999 U.S. Dist. LEXIS 16046, at *18 (S.D.N.Y. Oct. 19, 1999)).

to bar subsequent actions in the countries in which foreign investors reside. In support of their res judicata argument, defendants submitted nine affidavits from various law professors and practitioners. These included six affidavits concerning the likelihood of a court in France recognizing a US class action judgment, as well as additional affidavits addressing the same issue for England, Germany and Austria. Vivendi also submitted a number of expert affidavits in support of its other arguments in opposition to class certification,[10] as well as volumes of deposition excerpts, deposition exhibits, court transcripts, declarations and certifications.

In reply, plaintiffs submitted their own series of affidavits concerning the res judicata impact of a US judgment abroad, including affidavits for France, England, Germany, Austria and the Netherlands.[11] Plaintiffs also

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[10] Defendants opposed class certification on several other grounds -- each of which was rejected by Judge Holwell after careful consideration of the extensive briefing and evidentiary submissions from the parties. *E.g.*, Order at 67 (rejecting Vivendi's argument that a single class consisting of purchasers of both Vivendi ordinary shares and ADSs could not be certified because it is "undisputed that the two markets are highly integrated and nothing in defendants' submission supports the proposition that such minor inefficiencies between the markets that may exist will have any impact on class-wide proof of the element on reliance"); *id.* at 62-66 (reviewing the competing affidavits and concluding that the proposal by plaintiffs' notice expert, which described a program of providing individual notice to those class members whose names and addresses are ascertainable and implementing an international publication notice program, was manageable and the best means practicable of providing notice); *id.* at 16 (in view of the Second Circuit's decision in *IPO,* considering and then rejecting Vivendi's "damages" arguments); *id.* at 13-27 (rejecting the various attacks made by Vivendi on each of the proposed class representatives and finding them to be typical and adequate -- with the exception of the proposed class representative from Austria, who was not approved because of res judicata concerns cited by Judge Holwell).

[11] Plaintiffs did not submit any affidavits concerning other countries that were not specifically challenged by defendants, including Canada, whose

submitted several expert affidavits in response to the other issues raised by Vivendi (*see supra* at n.10), as well as three volumes of supplemental exhibits that were not submitted by Vivendi.

By the end of class certification briefing, which almost lasted an entire year, 23 expert affidavits were filed. In fact, as Judge Holwell noted, both sides submitted "voluminous competing expert declarations on the question of whether foreign courts would grant preclusive effect to a United States judgment or settlement in this action." Order at 37. Thus, it was not a surprise, especially given the amount of material to scrutinize and weigh, that Judge Holwell's 68-page decision was not issued until mid-March 2007 (more than eight months after oral argument).

IV. The Appropriate Legal Standards

Class certification decisions are entitled to great deference. *E.g.*, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999) (class certification decision "may only be overturned if it constitutes an abuse of discretion"). This is because the Second Circuit has a "longstanding view that the district court is often in the best position to assess the propriety of the class." *Sumitomo,* 262 F.3d at 139; *see Robidoux v. Celani,* 987 F.2d 931, 935 (2d Cir. 1993) (discussing the district court's broad discretion in class certification questions); *Caridad,* 191 F.3d at 291-92 (noting that the Second Circuit is more deferential whenever class certification is *granted*).

In view of this substantial deference, the Second Circuit has established a high threshold for interlocutory review

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residents have repeatedly been included in securities classes certified in this Circuit. *E.g.*, *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855, 2003 U.S. Dist. LEXIS 15702 (S.D.N.Y. Sept. 5, 2003); *In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62 (S.D.N.Y. 1999).

pursuant to Rule 23(f). *Sumitomo*, 262 F.3d at 140 ("We anticipate . . . that the standards of Rule 23(f) will rarely be met."). Review should only be granted in the exceptional case (unlike this one) where the petitioner can demonstrate:

> (1) that the certification order will effectively terminate the litigation *and* there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution. *Id.* at 139 (emphasis added).

As set forth herein, Vivendi has not met either of these standards.

V. Argument

A. Vivendi Has Waived And Cannot Argue That The District Court Erred By Failing To Apply An "Absolute" Certainty Standard With Respect To Res Judicata

Vivendi argues in its petition -- *for the first time* -- that the proper standard for analyzing the issue of foreign claim preclusion is that the ***plaintiffs*** must show claim preclusion to an "***absolute***" certainty.[12] Notwithstanding the fact that Vivendi's proposed standard has never been adopted by a single court (*see infra* at 16), Vivendi has waived this argument because it failed to raise it with the District Court

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[12] *E.g.*, Pet. at 10 ("the district court's failure to afford a foreign defendant (such as Vivendi) the full level of protection to which it is entitled under US law upon class certification -- namely ***complete*** claim preclusion -- is a due process violation") (emphasis added); *id.* at 12 ("[u]nless claim preclusion is ***absolute***," Rule 23(c)(2) notice is meaningless) (emphasis added); *id.* at 14 (class certification must be denied unless res judicata or subsequent claim preclusion with respect to all members of the class is "***guaranteed***") (emphasis added).

(despite ample opportunity to do so). *E.g., Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005) ("The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . waiver will bar raising the issue on appeal.") (citation omitted).

In fact, as Judge Holwell noted in his Order, Vivendi had repeatedly argued at the District Court level for *a more lenient* standard for plaintiffs:

> Relying primarily on Judge Friendly's opinion in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975), defendants argue that all foreign plaintiffs must be excluded from the class because it is a "near certainty" that if this action is dismissed, taken to judgment, or settled, defendants would not be able to assert claim preclusion to bar subsequent actions in the countries in which foreign plaintiffs reside. Order at 30.

However, in December 2006 and January 2007 (after *IPO* was decided), the parties made various submissions to Judge Holwell concerning the relevance to class certification of Judge Castell's recent approval of a comprehensive program to provide notice to eligible claimants of Vivendi's $50 million global settlement with the SEC. *See* Order at 66 n.22. In its submission, Vivendi cited the Second Circuit's decision in *IPO* but said nothing about how that decision had "fundamentally altered the law" concerning res judicata — even though the res judicata issue dominated the parties' submissions to date, and even though it was the main subject discussed at oral argument in July 2006. Thus, the Court should decline to consider Vivendi's proposed "absolute"

certainty standard since it is only being raised now for the first time.[13]

B. Vivendi Erroneously Argues That It Will Be Denied Due Process Unless Plaintiffs Demonstrate To An *Absolute* Certainty That Foreign Courts Will Recognize A US Judgment

Vivendi strenuously argues that due process precludes a class action on behalf of foreign investors if there is *any* chance (*no matter how remote*) that a decision by a US court would not be recognized by a foreign court.[14] Consequently, Vivendi believes that class certification should be reversed because foreign class members who are dissatisfied with the results obtained for them by the class representatives in this action might pursue Vivendi once again in a foreign court. While such a standard would obviously be very favorable for Vivendi, it has *never* been adopted by a single court.[15]

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[13] Similarly, Vivendi cannot now argue -- again for the first time -- that Federal Rule of Civil Procedure 44.1 required the District Court to make a specific determination of foreign law in deciding whether or not a class including foreign members satisfies the superiority requirement of Rule 23(b)(3). Vivendi did not assert in the District Court that any foreign court had decided the issue of whether or not to enforce a US class action judgment, and indeed the parties' experts agreed that this issue had never been addressed by foreign courts. *See* Order 38, 55. Thus, Rule 44.1 has no relevance to the District Court's decision.

[14] *See supra* at n.12.

[15] Vivendi cites *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981) as purported support for its "absolute" certainty standard. Pet. at 10-11. However, in *Dalkon*, the court's reference to due process related to its concern with "multiple punitive damage awards." *Id.* at 899. Thus the court's very brief discussion of res judicata and due process principles, in the context of punitive damages, provides no support for Vivendi's contention that the issue of foreign recognition of a US class action judgment must be proven to an "absolute" certainty.

Instead, Vivendi's argument largely depends upon its interpretation of the Second Circuit's recent decision in *IPO*. *E.g.*, Pet. at 4. Such reliance is misplaced, however, because in that case, the Second Circuit simply clarified that it is no longer sufficient to make "some showing" that the requirements of Rule 23 have been met. Indeed, as Judge Holwell stated on page 10 of his Order, the standard for class certification in this Circuit is now:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits. *IPO*, 471 F.3d at 41.

Thus, there is no basis for Vivendi's argument that the Second Circuit in *IPO* "fundamentally altered the law" so that no foreign investor can be included in a certified class unless the ***plaintiffs*** show to an ***absolute*** certainty that a US

judgment will be recognized in that foreign investor's own country. *See supra* at n.12.[16] Nor is there any basis to ignore the clear law that res judicata is only *one* factor to consider in deciding whether under Rule 23(b)(3) a class action is "superior to other available methods for the fair and efficient adjudication of the controversy,"[17] rather than the *sole* factor (as Vivendi also contends in its Petition for the first time, *see* Pet. at 13-18).

Indeed, taken to its logical conclusion, Vivendi's argument would require that US courts dismiss any action brought on behalf of a class including foreigners simply because there is a *possibility* that their country, or any country in which they might bring suit, might not recognize the res judicata effect of an adverse judgment rendered by a US court. In fact, many actions have been allowed to proceed

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[16] Indeed, under Vivendi's standard, Americans would also be excluded from the class because they might find a foreign country to sue in that might not give res judicata effect to the judgment.

[17] *E.g.*, *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 363-64 (S.D.N.Y. 2002) (res judicata is but one, non-dispositive factor to consider in assessing superiority under Rule 23(b)(3)) (Mukasey, J.); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 1998 U.S. Dist. LEXIS 1199, at *45 (S.D.N.Y. Feb. 4, 1998) (noting that in *Bersch*, the Second Circuit held that "the issue of res judicata was one of five issues the court should consider in deciding whether to exercise its discretion to maintain pendant jurisdiction") (Sweet, J.); *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 135 (S.D.N.Y. 2001) (Cote, J.), *motion for pet. for leave to appeal under F.R.C.P. 23(f) denied*, docket no. 02-8002 (2d Cir. Feb. 6, 2002) (certifying international class that included plaintiffs governed by Netherlands Antilles, English and Swiss law) ("Even where all the available evidence indicates that foreign plaintiffs who lose in the United States will be able to sue the defendant a second time in their own country, a class action may remain the superior means for litigating the dispute, particularly where the court can take action to increase the benefits for the defendant as well as the plaintiffs."); *see also In re Royal Ahold N. V. Sec. Litig.*, 219 F.R.D. 343, 352 (D. Md. 2003) ("This factor must be considered in determining whether a class action is the superior method of litigating a particular case, although it is not determinative.").

on a class basis even though some members of the class were foreigners.[18] It is hardly conceivable that, as Vivendi contends, the Second Circuit created a rule in *IPO* that would deny foreign investors recourse to class actions to enforce long-standing rights under federal statutes.

District Judge Robert Sweet rejected a similar argument in *Lloyd's*. In that case, Citibank argued (as Vivendi does here) that certification on behalf of foreign class members should be denied because it would violate "fundamental due process right[s]." *Id.* at *47. Judge Sweet rejected this argument, stating:

> Citibank supplies no guiding precedent for the proposition that they assert, namely that the *possibility* that a judgment of a United States court in a class action would have *no* res judicata effect in foreign courts for a substantial number of class

[18] *E.g., Cromer*, 205 F.R.D. at 133-35 (certifying class including European investors); *In re Nortel Networks*, 2003 U.S. Dist. LEXIS at *22 (Berman, J.) (certifying class of US and non-US purchasers), *motion for pet. for leave to appeal denied*, slip op., No. 03-8038 (2d Cir. Nov. 24, 2003); *In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig.*, 209 F.R.D. 353, 360-61 (S.D.N.Y. 2002) (Buchwald, J.) (same); *Krangel v. Golden Rule Res., Ltd.*, 194 F.R.D. 501, 506 (E.D. Pa. 2000); *Frietsch v. Refco, Inc.*, No. 92 C 6844, 1994 WL 10014, at *12 (N.D. Ill. Jan. 13, 1994) (certifying class including European investors); *Jordan v. Global Natural Res., Inc.*, 102 F.R.D. 45 (S.D. Ohio 1984) (inclusion of foreign investors proper); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24 (S.D. Cal. 1975) (class including Latin American and European investors certified); *see also In re Cable & Wireless, PLC*, 321 F. Supp. 2d 749 (E.D. Va. 2004) (finding no "near certainty" that an English court would not recognize a US class action judgment in favor of foreign investors); *Lloyd's*, 1998 U.S. Dist. LEXIS at *60 (S.D.N.Y. Feb. 4, 1998) (Sweet, J.) (including foreign investors in class action for breach of fiduciary duty); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005) (rejecting, on motion to dismiss for lack of jurisdiction, defendants' arguments that there was "near certainty" that foreign courts in, among other places, Holland, England, France, Germany and Austria, would not enforce a US class action judgment).

> members, nor do we believe there is any. While Citibank is correct in asserting that a class action certification must, in addition to complying with the specific requirements of Rule 23, also comply with the constitutional guarantee of due process of law, *there is no such deprivation here*. *Id.* at *48 (emphasis added).

There are many other reasons why the Court should reject Vivendi's petition. First, Vivendi severely overstates the risk of nonrecognition of a US class action judgment. Specifically, plaintiffs submitted affidavits from a number of experts who are highly knowledgeable about the law in the foreign countries where the overwhelming majority of foreign class members reside. In the absence of controlling precedent, or indeed, any precedent at all, plaintiffs' experts concluded that there can be *no certainty* one way or the other, and good arguments for recognition plainly exist that could reasonably be adopted by a foreign court. *E.g.*, Order at 52 (in France, "plaintiffs' experts have shown a probability" that "a judgment in this case would, more likely than not, be granted recognition"); *id.* at 54-55 ("While the issue is hardly free from doubt, based on the affidavits before it, the Court concludes that English courts, when ultimately presented with the issue, are more likely than not to find that US courts are competent to adjudicate with finality the claims of absent class members and, therefore, would recognize a judgment or settlement in this action.") (citing Declaration of Prof. Jonathan Harris at ¶¶ 14-20, 50-51; John C.L. Dixon, *The Res Judicata Effect in England of a US Class Action Settlement*, 46 INT'L & COMP. L.Q. 134, 145-50 (1997)).

Second, the "absolute" certainty standard proposed by Vivendi is outweighed by the fact that US courts have a significant interest in advancing the federal policy of deterring foreign defendants from using the US as a base from which to violate the federal securities laws. Indeed, District Judges Baer and Holwell have already twice

determined that defendants' conduct on US soil in perpetration of a fraudulent scheme warrants exercise of US jurisdiction.[19] Moreover, Vivendi's standard would effectively immunize foreign defendants who come to the US and commit fraud on non-residents. If defendants are exposed to greater liability and risk as a result, that is a consequence of their own conduct and warrants no sympathy from this or any other court in the US.

Third, in the event that later actions are instituted against Vivendi, the defenses of res judicata or collateral estoppel may be valid to the extent that the issues in the subsequent actions are common to those adjudicated in this action. Indeed, even if a US judgment in Vivendi's favor is not considered res judicata against an investor who took no

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[19] It is clear that the anti-fraud provisions of the federal securities laws apply to losses sustained by foreign citizens or residents when the alleged frauds occurred within the US, as in this case. *E.g.*, *In re Vivendi*, 2004 WL 2375830, at *3 (citing *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983)). In this class action, as well as the related actions currently before Judge Holwell, significant acts occurred in the US, principally in the Southern District of New York. In fact, as set forth above, Vivendi conducted substantial business in New York, maintained its US headquarters here, and, as Judge Holwell noted in his class certification decision, defendants' alleged fraud was "perpetrated, in important part, in the United States." *E.g.*, Order at 6 ("Vivendi's rapid expansion scheme involved the acquisition of numerous well-known U.S. entertainment and publishing companies, such as [Universal Music Group,] Universal Studios, Houghton Mifflin, [US Filter] and USA Networks," and "in order to successfully accomplish this plan, it took on $21 billion in debt while . . . fraudulently assuring all investors through false and misleading reports filed with the SEC and news releases that it had sufficient cash-flow to manage its debts."); *id.* ("[B]oth of the alleged principal actors in this scheme, [defendants] Messier and Hannezo, moved to the United States during 2001. Messier, in particular, moved his primary residence to New York in September 2001, and spent half of his time in the United States from that time through the end of the class period" for the "stated purpose of increasing United States investments in Vivendi."); *id.* ("Many of the statements alleged to be false and misleading were made by defendant Messier after he had moved to New York.").

affirmative steps in this action, it would at least be *evidence* in every country and it could be utilized by Vivendi in defense of subsequent foreign lawsuits (to the extent there are any). *See Cromer*, 205 F.R.D. at 135 ("foreign courts, even if faced with a second round of litigation, may look to the results achieved in the [US] for guidance, and . . . if the plaintiffs succeed or if the action were settled, a court-fashioned proof of claim mechanism might be able to bind all participants and discourage relitigation") (citing *Lloyd's* at *44-45).[20]

Fourth, Vivendi's purported fear of future lawsuits is seriously undermined by the fact that in the approximate five years since Vivendi was brought to the brink of bankruptcy by its former CEO (defendant Messier), only *three* actions have been commenced outside the US against Vivendi or any other defendant presently involved in this complex litigation (*one of which was dismissed*). Order at 29-30.

Lastly, as plaintiffs' experts noted in their affidavits, the practical likelihood of any significant future re-litigation of this case in Europe is incredibly slim (and essentially non-existent). For example, if the case results in a recovery for plaintiffs, foreign purchasers who do not opt out are unlikely to pursue an individual action against defendants because (1) they would run the significant risk that defendants would successfully invoke the District Court's judgment as precluding their recovery, (2) they would run the risk of having to pay defendants' counsel fees and litigation costs,

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[20] Vivendi argues that in this "increasingly global economy," the District Court's decision will encourage "countless securities class action claims by foreign shareholders" and create forum shopping -- which, of course, has not happened. Pet. at 19. However, such an argument has little weight in this case because, as explained in a First Circuit decision *cited by Vivendi*, "a foreign national that chooses to engage in business in the United States likewise must demonstrate due respect for the operation of the American judicial system." *Quaak v. KPMG*, 361 F.3d 11, 22 (1st Cir. 2004).

and (3) they would not have the benefit of a US-style contingency fee agreement. *See* Pls.' Class Cert. Reply Br. at 11 (citing Prof. Smit Decl. at ¶ 105). Thus, foreign members of the Class who have not opted out are most likely to seek to participate in any recovery approved by the District Court. *Id.* Conversely, if the defendants prevail, it is very unlikely that foreign purchasers who have not opted out would pursue their individual actions in the foreign court because the likelihood of prevailing after the defendants had won in the District Court would be minimal, and their exposure to having to pay defendants' cost and counsel fees would be substantial. *Id.*

In conclusion, Vivendi is essentially asking this Court to ignore reality and reverse class certification because of theoretical difficulties having no practical substance. If class status for foreign investors were denied in this action, all such investors would be obliged to institute individual actions in US courts or to sue abroad. In fact, Vivendi undoubtedly realizes that if class certification for foreign investors is denied in this lawsuit, those investors will *not* find it economically feasible to commence alternative actions, thereby allowing Vivendi to escape the substantial consequences of its fraud on those investors.[21] Given that a substantial part of the fraud that was perpetrated upon these investors occurred in the US (particularly in New York), such a result would be unconscionable.[22]

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[21] *See U.S. Fin.*, 69 F.R.D. at 48-49 (certifying class including foreign investors and noting that factors such as absence of discovery and costs of bringing suit overseas made it "unlikely" that the defendants would be sued again overseas); *Turkcell*, 209 F.R.D. at 360-61 (same).

[22] Indeed, as Judge Cote explained in *Cromer*, "many events would have to occur before [defendant] would be prejudiced by an inability to assert the defense of res judicata successfully. Specifically, (1) the class action would have to be tried to judgment, despite the greater likelihood that the case would instead be settled; (2) the class would have to lose on the merits; (3) an absent class member would have to bring a subsequent

VI. Conclusion

For the foregoing reasons, the Second Circuit should not grant immediate appellate review pursuant to Rule 23(f).

Dated April 27, 2007

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lawsuit in an English or Swiss court, despite such practical deterrents as the unavailability of contingent-fee representation or a class action vehicle in those courts; (4) the absent class member would have to succeed in establishing jurisdiction over the defendants in that foreign court; [and] (5) the absent class member would have to convince the foreign court to ignore this Court's ruling and render judgment in its favor on the merits." 205 F.R.D. at 135 n.32.

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CERTIFICATE OF SERVICE

I, William B. Scoville, Jr., hereby certify that I caused true and correct copies of the Answer of Class Plaintiffs To The Petitions Filed Pursuant To Fed. R. Civ. P. 23(f) For Leave To Appeal From The District Court's Class Certification Order to be served upon the following via First Class Mail on this 27th day of April, 2007:

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APPENDIX K

NOTICE OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, FILED OCTOBER 20, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	Civil Action No. 02 Civ. 5571 (RJH)

NOTICE OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

PLEASE TAKE NOTICE that, upon the accompanying memorandum of law and all prior papers and proceedings had herein, Prigest S.A., Tocqueville Finance, Olivier M. Gerard, Retirement System for General Employees of the City of Miami Beach, StoneRidge Investment Partners LLC and Bruce Doniger, on behalf of themselves and all others similarly situated, will move this Court, before the Honorable Richard J. Holwell of the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York 10007, for an Order:

(i) certifying a class consisting of all persons who purchased or otherwise acquired the common stock or American Depositary Shares of Vivendi Universal, S.A. during the period between October 30, 2000 and August 14, 2002, inclusive; excluded from the class are defendants, the members of their families, any entity in which any defendant has a controlling interest, or which is a parent or subsidiary of, or which is controlled by, Vivendi Universal, S.A., and the officers, directors, affiliates, legal representatives, heirs, predecessors, successors or assigns of any of the defendants;

(ii) appointing Prigest S.A., Tocqueville Finance, Olivier M. Gerard, Retirement System for General Employees of the City of Miami Beach, StoneRidge Investment Partners LLC and Bruce Doniger as class

representatives, and appointing Milberg Weiss Bershad & Schulman LLP and Abbey Gardy, LLP as class counsel; and

(iii) for such other relief as may be just and proper.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Notice of Plaintiffs' Motion For Class Certification has been served upon the following parties by placing a copy of same in the United States Mail, first class postage pre-paid on the 20th day of October, 2004:

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APPENDIX L

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, FILED OCTOBER 20, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	No. 02 Civ. 5571 (RJH)
This Document Relates To: All Actions	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Prigest S.A., Tocqueville Finance, Olivier M. Gerard, Retirement System for General Employees of the City of Miami Beach, Bruce Doniger and StoneRidge Investment Partners LLC *(plaintiffs* or *proposed class representatives)* respectfully submit this memorandum of law in support of their motion for certification of a class (the *Class)* for the prosecution of their federal securities claims against defendant Vivendi Universal, S.A. *(Vivendi)* and two of its most senior former officers: defendants Jean-Marie Messier and Guillaume Hannezo *(Individual Defendants).*

As the Court is aware, plaintiffs allege that defendants' public statements during the *Class Period* (October 30, 2000 through August 14, 2002, inclusive) were materially false and misleading because they failed to disclose, among other things, that: (1) Vivendi's corporate acquisition spree had brought Vivendi to the brink of a potentially catastrophic liquidity crisis; (2) Vivendi had wrongfully failed to write-down billions of dollars of impaired goodwill from prior acquisitions (e.g., Canal Plus and U.S. Filter); and (3) although it consolidated the financial results (including billions of dollars in revenue) of several majority owned subsidiaries (e.g., Cegetel and Maroc Telecom), Vivendi did not have access to the cash flows of these entities. As a result of Vivendi's materially false and misleading statements and omissions, plaintiffs allege that the prices of Vivendi securities were artificially inflated during the Class Period, thereby causing damage to members of the Class who purchased such securities in reliance on the integrity of the market.

The Second Circuit emphatically favors the use of class actions for resolution of securities claims.[1] To that end, the Second Circuit has directed courts to interpret and apply Rule 23 liberally, rather than restrictively.[2] "Accordingly, in securities cases, 'when a court is in doubt as to whether or not to certify a class action, the court should err in favor of allowing the class to go forward.'"[3]

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[1] *Green v. Wolf Corp.*, 406 F.2d 291, 296-97 (2d Cir. 1968) (Rule 23 "illustrates the need for an effective use of class actions in securities act litigation").

[2] *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990) ("In light of the importance of the class action device in securities fraud suits, these factors are to be construed liberally."); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972) (courts must be "mindful of the admonition of liberality toward demands for class suit status in securities litigation"); *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965) ("The usefulness of the representative action as a device for the aggregation of small claims is 'persuasive of the necessity of a liberal construction of . . . Rule 23.'") (citation omitted); *see also Dietrich v. Bauer*, 192 F.R.D. 119, 122 (S.D.N.Y. 2000) (Rule 23 is to be applied in a liberal fashion when considering claims brought under the federal securities laws); *In re Oxford Health Plans, Inc. Sec. Litig.*, 191 F.R.D. 369, 373 (S.D.N.Y. 2000) ("our Court of Appeals has directed district courts to avoid applying Rule 23 under a restrictive interpretation"); *In re Blech Sec. Litig.*, 187 F.R.D. 97, 102 (S.D.N.Y. 1999) ("Class action treatment of related claims is particularly appropriate when plaintiffs seek redress for violations of the securities laws. It is well recognized that private enforcement of these laws is a necessary supplement to government regulation."); *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 54 (S.D.N.Y. 1993) (there is a "preference for class certification in securities cases" as certification is important "for small securities holders located throughout the country"); *Epifano v. Boardroom Bus. Prods., Inc.*, 130 F.R.D. 295, 298 (S.D.N.Y. 1990) ("There is a strong public policy in favor of private enforcement of the nation's securities laws . . . . A class action is both an effective and appropriate method for resolving securities law claims.").

[3] By providing a single forum in which to litigate the same or similar claims, a class action also affords an indispensable mechanism for the conservation of judicial resources. *See In re Initial Public Offering Sec. Litig.*, 21 MC 92 (SAS), 2004 U.S. Dist. LEXIS 20497, *3 (S.D.N.Y.

As set forth below, movants have overwhelmingly satisfied the requirements of Rule 23. The proposed class representatives and their counsel will fairly and adequately protect the interests of the Class they seek to represent, which consists of all persons who purchased or otherwise acquired the common stock or American Depositary Shares *(ADSs)* of Vivendi during the Class Period. Each of the proposed class representatives' claims is typical. In this securities litigation, common questions predominate over any questions affecting only individual members of the Class. All members of the Class seek to prove the same misrepresentations and omissions. Co-Lead Counsel have vigorously pursued the interests of the Class throughout this litigation. Co-Lead Counsel have filed a First Amended Consolidated Class Action Complaint *(Complaint)*, successfully prosecuted this case through the lead plaintiff appointment process, defeated defendants' motions to dismiss (and subsequent motions for reconsideration), and engaged in extensive discovery including the review of tens of thousands of pages of documents. Furthermore, Co-Lead Counsel have responded to defendants' interrogatories and requests for production of documents, and the proposed class representatives will be appearing for deposition.

Oct. 13, 2004) ("'The class action device was designed to promote judicial efficiency and to provide aggrieved persons a remedy when individual litigation is economically unrealistic, as well as to protect the interests of absentee class members.'") (quoting 5 JAMES WM. MOORE, et al., MOORE'S FEDERAL PRACTICE ¶ 23.03 (3d ed. 2004); *see also Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) ("the effectiveness of the securities laws may depend in large measure on the application of the class action device"); *Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983) ("Separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts."). Rule 23 is, therefore, broadly structured so as to facilitate certification of class actions. "The interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." *Eisenberg*, 766 F.2d at 785 (quoting *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968)).

Accordingly, plaintiffs respectfully request that this action be certified as a class action.

II. PROCEDURAL HISTORY

Plaintiffs filed their original complaint in this action in July 2002, shortly after defendant Messier was forced to resign and Vivendi's new management acknowledged the existence of a "liquidity issue." Complaint at ¶ 110. On November 1, 2002, pursuant to the Private Securities Litigation Reform Act of 1995, Judge Baer appointed the Miami Group[4] and the Pearson-Doniger Family[5] as co-lead plaintiffs, and approved their selection of counsel, the firms of Milberg Weiss Bershad Hynes & Lerach LLP (*Milberg Weiss*)[6] and Abbey Gardy, LLP (*Abbey Gardy*).

Plaintiffs' Consolidated Class Action Complaint was filed on January 7, 2003. Each of the defendants moved to dismiss. On November 3, 2003, Judge Baer denied all motions to dismiss claims under Section 10(b) of the Securities Exchange Act of 1934. In particular, Judge Baer found that defendants' conduct in the United States was more than merely preparatory to the alleged fraudulent scheme, and that accordingly the Court had subject matter jurisdiction over the claims brought by foreign purchasers of Vivendi common stock:

> Contrary to defendants' characterization, their conduct can hardly be deemed merely preparatory within the United States Given [individual

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[4] The Miami Group consists of the Retirement System for General Employees of the City of Miami Beach, Prigest S.A., Tocqueville Finance S.A., Olivier M. Gerard and Francois R. Gerard.

[5] The Pearson-Doniger Family consists of Bruce Doniger, Beatrice Doniger, Grandchildren's Trust by Bruce Doniger Trustee, Alison Doniger, Michael Doniger, Edward B. Brunswick, and Ruth Pearson Trust Pearson Trustee.

[6] This firm is now known as Milberg Weiss Bershad & Schulman LLP.

> defendants] Messier's and Hannezo's decision to move to the United States, allegedly to better direct corporate operations and more effectively promote misleading perceptions on Wall Street . . . one can reasonably infer that the alleged fraud on the American Exchange was a 'substantial' or significant contributing cause of [foreign investor's] decision[s] to purchase [Vivendi's] stock' abroad.[7]

On September 21, 2004, this Court denied defendants' motions for reconsideration.[8]

III. ARGUMENT

A. The Requirements Of Rule 23

Federal Rule of Civil Procedure 23 governs class certification. To be certified, a putative class must meet all four prerequisites of Rule 23(a), as well as the requirements of one of the three subsections of Rule 23(b). In this case, as in most cases seeking monetary damages, plaintiffs must demonstrate that the class meets the four requirements of Rule 23(a) – numerosity, commonality, typicality and adequacy[9] – and that the action is "maintainable" under Rule 23(b)(3).[10] Under Rule 23(b)(3), "common" issues of law or fact must "predominate over any questions affecting

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[7] *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571, 2003 U.S. Dist. LEXIS 19431, at *22-23 (S.D.N.Y. Nov. 4, 2003).

[8] Judge Baer granted plaintiffs leave to amend their claims under Section 14(a) of the 1934 Act, as well as their claims under Sections 11 and 12(a)(2) of the Securities Act of 1933, based on standing issues. Plaintiffs filed their amended complaint on November 24, 2003. The Court granted defendants' subsequent motions to dismiss plaintiffs' amended Section 14 claim.

[9] *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999).

[10] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

only individual members," and a class action must be demonstrably "superior" to other methods of adjudication.[11]

For the purposes of a class certification motion, plaintiffs' allegations are to be taken as true and the Court does not examine the merits of plaintiffs' case.[12] Thus, the focus of the Court's inquiry in deciding this motion is simply on whether the Rule 23 requirements have been met, and not on the merits of plaintiffs' claims.

B. Rule 23(a) Is Satisfied

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable

Rule 23 requires that the class must be "so numerous that joinder of all members is impracticable."[13] "Impracticability does not mean impossibility of joinder, but refers to the difficulty or inconvenience of joinder."[14] Although precise calculation of the number of class members is not required, and it is permissible for the court to rely on reasonable inferences drawn from available facts, numbers in

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[11] Fed. R. Civ. P. 23(b)(3).

[12] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met"); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (a motion for class certification "is not an occasion for examination of the merits of the case"); *Caridad*, 191 F.3d at 293 (2d Cir. 1999) ("In deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class."); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 279 (S.D.N.Y. 2003) ("At class certification, the court determines whether the requirements of Rule 23 are met, not whether the claims are adequately pleaded or who will prevail on the merits.").

[13] Fed. R. Civ. P. 23(a)(1); *Maywalt*, 147 F.R.D. at 54.

[14] *In re Indep. Energy.*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002) (SAS) (citing *In re Avon Sec. Litig.*, No. 91 Civ. 2287, 1998 WL 834366, at *5 (S.D.N.Y. Nov. 30, 1998)).

excess of forty generally satisfy the numerosity requirement.[15]

Throughout the Class Period, Vivendi's ADSs were actively traded on the New York Stock Exchange, in a well-developed and efficient market. Complaint at ¶ 41. Vivendi's ordinary shares were actively traded on the EuroNext Paris S.A. *(Paris Bourse),* also an efficient market. *Id.* As of December 31, 2001, the Company had more than 107 million ADSs, and more than 1 billion ordinary shares outstanding. *Id.* Therefore, the numerosity of the Class cannot be disputed. *Id.*[16]

2. There Are Questions Of Law Or Fact Common To Members Of The Class

Rule 23(a) requires a showing that common issues of fact or law affect all class members.[17] A single common

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[15] *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y. 1992); *see In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277, 280 (S.D.N.Y. 2002) (finding numerosity where the defendant had issued "[t]ens of millions" of ADSs in the United States); *see also In re Frontier Ins. Group Sec. Litig.*, 172 F.R.D. 31, 40 (E.D.N.Y. 1997) ("In securities fraud actions brought against publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period.").

[16] *See, e.g., Dietrich*, 192 F.R.A. at 123 (allegations in a securities action that the defendant company was traded on the NASDAQ National Market System, had 22.5 million shares outstanding held by approximately 522 record holders were facts reasonable to "infer that the class is sufficiently large to meet Rule 23(a)'s numerosity requirement"); *In re Oxford Health*, 191 F.R.D. at 374 ("Here, because Oxford stock was traded in high volume during the class period, the precise number of class members could be, and very likely is, numbered in the thousands . . . [t]he [n]umerosity requirement is satisfied."); *see also Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1039 (5th Cir. 1981) (finding that numerosity is generally presumed when a claim involves a nationally traded security).

[17] Fed. R. Civ. P. 23(a)(2); *Trief*, 144 F.R.D. at 198.

question may be sufficient to satisfy the commonality requirement.[18] "The critical inquiry is whether the common questions are at the core of the cause of action alleged."[19]

The commonality requirement is generally considered a low hurdle that "has been applied permissively by courts in the context of securities fraud litigation."[20] In general, where putative class members have been injured by similar material misrepresentations and omissions, the commonality requirement is satisfied.[21]

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[18] *German v. Federal Home Loan Mortgage Corp.*, 885 F. Supp. 537, 553 (S.D.N.Y. 1995); *see also Cutler v. Perales*, 128 F.R.D. 39, 44 (S.D.N.Y. 1989) (commonality "does not mean that all issues must be identical as to each [class] member, but it does require that plaintiffs identify some unifying thread among the members' claims that warrants class treatment'") (quoting *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986)).

[19] *D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 456 (E.D.N.Y. 1996) (quotation omitted); *see In re Avon Sec. Litig.*, No. 91 Civ. 2287 (LMM), 1998 U.S. Dist. LEXIS 18642, at *15 (S.D.N.Y. Nov. 19, 1998) ("Commonality does not mandate that all class members make identical claims and arguments") (citation omitted); *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1334 (S.D.N.Y. 1988) ("not every question of fact or law raised need be common to every member of the class"); *see also In re VMS Sec. Litig.*, 136 F.R.D. 466, 473 (N.D. Ill. 1991) (factual variations among class members' grievances will not defeat the commonality requirement so long as the claims arise from a "common nucleus of operative facts").

[20] *In re Blech*, 187 F.R.D. at 104.

[21] *See, e.g., In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 426 (S.D.N.Y. 1986) ("The nub of plaintiffs' claims is that material information was withheld from the entire putative class in each action, either by written or oral communication. Essentially, this is a course of conduct case, which as pled satisfies the commonality requirement of Rule 23 . . . ."); *see also Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975) ("Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable . . . .").

In this case, the common legal and factual issues include: (i) whether defendants violated the securities laws by the acts and conduct alleged in the Complaint; (ii) whether defendants issued false and misleading statements during the Class Period; (iii) whether defendants acted with scienter in issuing materially false and misleading statements; (iv) whether the market prices of Vivendi common stock and ADSs during the Class Period were artificially inflated because of defendants' misconduct; and (v) whether the members of the Class sustained damages and, if so, what is the appropriate measure of those damages.[22]

3. Plaintiffs' Claims Are Typical Of Those Of The Members Of The Class

Rule 23(a)(3) requires that the claims asserted by the proposed class representative be typical of the claims of each member of the class.[23] A representative's claims are typical if they arise from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.[24] "Typicality under Rule 23 requires that a class representative 'have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.'"[25] "[T]ypical," therefore, does not mean "identical."[26]

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[22] Complaint at ¶ 45.

[23] Fed. R. Civ. P. 23(a)(3).

[24] *See In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992).

[25] *In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126 (S.D.N.Y. 1997) (citing *Daniels v. Amerco, No.* 81 Civ. 3801 (RLC), 1983 U.S. Dist. LEXIS 18670 (S.D.N.Y. Mar. 10, 1983)).

[26] *Trief*, 144 F.R.D. at 200.

The typicality requirement of Rule 23(a)(3) is not demanding.[27] Courts have recognized that this requirement "can be met with surprising ease in most cases, because the majority of class action decisions support the view that when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is met."[28] A plaintiff's claims satisfy the typicality requirement if, as in this case, they "arise[] from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."[29]

Moreover, the "typicality requirement is not defeated by minor variations in the fact patterns of individual class member's claims."[30] Thus, because the typicality inquiry focuses on the nature of the claims asserted, any factual difference involving the date, type and manner by which the investor acquired his securities, the investor's perception of the transaction, or even the information furnished to him or her at the time of the purchase will not destroy typicality if each class member was the victim of the same material omissions and the same consistent course of conduct.[31] Accordingly, the commonality and typicality requirements "'tend to merge' because '[b]oth serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so inter-related that the interests of the class

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[27] *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001).

[28] *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 139 (D.N.J. 1984), *rev'd and remanded on other grounds*, 843 F.2d 1537 (3d Cir. 1988) (citation omitted).

[29] *In re Drexel Burnham*, 960 F.2d at 291.

[30] *Abdul-Malik v. Coombe*, No. 96 Civ. 1021 (DLC), 1996 U.S. Dist. LEXIS 18203, at *6 (S.D.N.Y. Dec. 5, 1996); *see also* 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.13, at 329 (4th ed. 2002).

[31] *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 428 (S.D.N.Y. 1986); *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981); *Oscar Gruss & Son v. Geon Indus., Inc.*, 75 F.R.D. 531, 534-35 (S.D.N.Y. 1977).

members will be fairly and adequately protected in their absence.'"[32]

The proposed class representatives' claims in this case are clearly typical of the claims of the Class because they arise out of the same uniform pattern of conduct – i.e., defendants' failure to disclose that Vivendi's operations and financial condition were dramatically weaker than what their public statements portrayed. Thus, the proposed class representatives stand in precisely the same position as do other investors who acquired Vivendi stock and ADSs during the Class Period. Moreover, the proposed class representatives and each of the Class members claim that, as a result of defendants' actions, they have been financially injured.[33]

4. Plaintiffs Will Fairly And Adequately Protect The Interests Of The Class

Plaintiffs must also show that "the representative parties will fairly and adequately protect the interests of the class."[34] To do so, plaintiffs must demonstrate that: (i) the plaintiff's interests are not antagonistic to the other members of the Class; and (ii) the representative party's attorney is qualified, experienced and generally able to conduct the litigation.[35]

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[32] *Caridad*, 191 F.3d at 291 (alterations in original) (quoting *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982)).

[33] *See, e.g., In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 40-41 (E.D.N.Y. 1991) ("Plaintiffs' claims are typical of those of absent class members. They allege injury resulting from the same course of conduct that injured the absent class members and are based on the same theories of recovery.").

[34] Fed. R. Civ. P. 23(a)(4).

[35] *See In re Drexel Burnham*, 960 F.2d at 291; *In re Oxford Health*, 191 F.R.D. at 376; *Daniels v. City of N.Y.*, 198 F.R.D. 409, 414 (S.D.N.Y. 2001); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 114 F.R.D. 48, 53 (S.D.N.Y. 1987).

First, as discussed above, the proposed class representatives' interests are co-extensive and do not conflict with class members' interests, and are typical of the claims of the other members. Plaintiffs and all class members have suffered losses due to their purchase of Vivendi securities. They have been injured by the same wrongful course of conduct of the defendants, and it is in the proposed class representatives' interests to vigorously prosecute this action on behalf of the Class.

With regard to the second component, proposed class counsel (Milberg Weiss and Abbey Gardy) are experienced class action attorneys who have qualified as lead counsel in numerous nationwide class actions (including this one). The proposed class counsel have substantial expertise in the investigation and prosecution of complex class actions, including those involving securities fraud.

C. This Action Meets the Requirements of Rule 23(b)(3)

Once plaintiffs demonstrate that the proposed class satisfies the elements of Rule 23(a), they must establish that the action is "maintainable" as defined by Rule 23(b). Rule 23(b) provides that "an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition" one of three alternative definitions of maintainability is met. This proposed class action is maintainable under subsection (b)(3), which requires "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[36] Rule 23(b)(3) thus has two elements: "predominance" and "superiority."

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[36] Fed. R. Civ. P. 23(b)(3).

The issues of predominance and superiority are not amenable to a bright line test. Rather, the inquiry under this subdivision is whether class certification will ensure economies of time and money by allowing a few representatives to proceed on behalf of a larger whole so that a class action would be the most efficient method of proceeding.[37]

1. Common Questions Of Law Or Fact Predominate

"In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof."[38] "Courts generally focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions."[39] Accordingly, as the Supreme Court noted in *Amchem,*

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[37] *In re Lilco Sec. Litig.*, 111 F.R.D. 663, 668 (E.D.N.Y. 1986); *see also* Fed. R. Civ. P. 23(b)(3) Advisory Committee Note (acknowledging that class action is an appealing tool for adjudicating cases of "fraud perpetrated on numerous persons by the use of similar misrepresentations").

[38] *In re VISA Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (quotation marks and citation omitted); *see also* 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1778 at 528 (2d ed. 1986) (predominance requirement is generally found to be satisfied "[w]hen common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication").

[39] *In re Prudential Sec. Inc. Ltd.. P'ships Litig.*, 163 F.R.D. 200, 206 (S.D.N.Y. 1995) (quoting *Dura-Bilt Corp.*, 89 F.R.D. at 93).

"[p]redominance is a test readily met in certain cases alleging consumer or securities fraud."[40]

As set forth above, the central focus of this litigation is defendants' knowing failure to disclose that Vivendi's operations and financial condition were dramatically weaker than what they led the public to believe. The uniform applicability of these liability issues is "readily susceptible to class-wide proof."[41] In fact, plaintiffs' allegations in this case constitute the type of common conduct that fits well within the Second Circuit's standards for class certification under Rule 23(b)(3).[42]

Moreover, whether any class member relied on a particular representation or material omission is not an issue in this case because reliance is presumed under the fraud on the market doctrine. As the Supreme Court explained:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . .

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[40] *Amchem Prods.*, 521 U.S. at 625; *see also In re Lilco*, 111 F.R.D. at 668; *In re Arakis Energy Corp. Sec. Litig.*, No. 95-CV-3431 (ARR), 1999 U.S. Dist. LEXIS 22246, at *37 (E.D.N.Y. Apr. 23, 1999) ("In securities fraud class actions in which the fraud is alleged to have been carried out through public communications to a wide variety of market participants, common issues of law and fact will generally predominate over individual issues.").

[41] *In re Baldwin-United*, 122 F.R.D. at 427; *In re Prudential*, 163 F.R.D. at 207 ("'[I]t would be folly to force each [investor] to prove the nucleus of the alleged fraud again and again.'" (quoting *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 140 F.R.D. 425, 431 (D. Ariz. 1992)).

[42] *Green*, 406 F.2d at 300-301; *In re Symbol Techs. Class Action Litig.*, 92-CV-3492 (JG), 1996 U.S. Dist. LEXIS 3297, *4 (E.D.N.Y. Mar. 18, 1996).

> Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.[43]

Thus, the fraud on the market doctrine dispenses with the requirement that an investor prove that he or she was aware of a particular misstatement, or that he or she directly relied on it.[44] As explained by the Second Circuit, the fraud on the market doctrine "creates a rebuttable presumption that (1) misrepresentations by an issuer affect the price of securities traded in the open market, and (2) investors rely on the market price of securities as an accurate measure of their intrinsic value."[45]

Rebutting the presumption of reliance is extremely difficult. As stated by the Supreme Court, "[i]t has been noted that 'it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?'"[46] "Requiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed . . . or if the misrepresentation had not been made . . . would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market.'"[47] Thus, at the class certification stage, defendants cannot rebut the presumption

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[43] *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988) (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

[44] *Id.* at 246-47.

[45] *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 77 (2d Cir. 2004).

[46] *Basic*, 485 U.S. at 246-47 (citations and footnotes omitted).

[47] *Id.* at 244 (other citations omitted); *see also Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975) (reliance established by "proof of materiality [of alleged misrepresentations and omissions] coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock") (quoted approvingly in *Basic*, 485 U.S. at 245).

of reliance, challenge the typicality of plaintiffs' claims, nor raise reliance as a potential individual issue.[48]

2. A Class Action Is The Superior Method Of Adjudication

The superiority prong of Rule 23(b)(3) requires a court to consider whether a class action is superior to other methods of adjudication.[49] The class action device is particularly appropriate for addressing the claims at issue in this case. The claims involve a large number of investors who are geographically dispersed, and whose relatively small claims make it prohibitively expensive to seek recovery through individual litigation.[50]

In addition, the four factors specified in Rule 23(b)(3) favor class certifications.[51] First, individual members do not have an interest in controlling the action. Although a few Class members may have suffered damages substantial enough that might make it economically viable for them to bring their own suits (e.g., Liberty Media Corp.), this fact does not warrant a finding that Class members have an interest in individually controlling the litigation so that the action may not be certified under Rule 23(b)(3).[52] Second,

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[48] *See Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999).

[49] Fed. R. Civ. P. 23(b)(3); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).

[50] *See Califano v. Yamasaki*, 442 U.S. 682, 690 (1979) (duplication of actions is the very "evil that Rule 23 was designed to prevent"); *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968) ("the alternatives [to a class action] are either no recourse for thousands of [investors]" or "a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake"); *see also Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983) ("Separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts.").

[51] Fed. R. Civ. P. 23(b)(3).

[52] As one commentator has noted, and as the cases cited above demonstrate, the reference in Rule 23(b)(3) to the interest of individual

plaintiffs are unaware of any other class litigation seeking recovery from defendants based on this conduct. Third, it is clearly desirable to concentrate litigation on behalf of all Class members in one forum. Inconsistent adjudications will be avoided, thus promoting the fair and efficient use of the judicial system. Fourth, this case presents no unusual difficulties in the management of the action. Plaintiffs' counsel and the Court have handled numerous similar actions and the appropriate procedures and techniques for the management of such suits are well-established. Moreover, the flexibility provided to the Court under Rule 23 will enable it to address and resolve any management difficulties if they should arise.[53]

Thus, it is clear that securities suits such as this one easily satisfy the superiority requirement of Rule 23. Moreover, the alternatives to a class action are either no recourse for thousands of investors or a multiplicity of scattered suits resulting in the inefficient administration of litigation that follows.[54]

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class members in controlling the litigation relates to the interests of most or all of the class members, rather than the interests of only a few, since if only a small fraction of the class has an interest in controlling the litigation, their interest may be served by opting out of the suit, or by entering an appearance under Rule 23(c)(2) or by intervening. 2 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.29 at 256 (4th ed. 2002).

[53] Fed. R. Civ. P. 23(c); Fed. R. Civ. P. 23(d).

[54] *Green*, 406 F.2d at 296 ("[A] class action may well be the appropriate means for expeditious litigation of the issues, because a large number of individuals may have been injured, although no on person may have been damaged to a degree which would have induced him to institute litigation solely on his own behalf."); *In re Blech*, 187 F.R.D. at 107 (superiority requirement satisfied as "[m]ultiple lawsuits would be costly and inefficient" and "although a large number of individuals may have been injured, no one person may have been damaged to a degree which would induce him to institute litigation solely on his own behalf"); *Bresson v. Thomson McKinnon Sec. Inc.*, 118 F.R.D. 339, 345 (S.D.N.Y. 1988) (average investment of $8,600 would probably not be deemed sufficient

D. Foreign Investors Who Purchased Vivendi Securities On Foreign Exchanges Are Proper Class Members

The Court has already concluded that, under the "conduct test" – which the Second Circuit has adopted to determine when extraterritorial application of the federal securities laws is warranted[55] – there is subject matter jurisdiction over the claims brought by foreign plaintiffs. In denying defendants' motions to dismiss, Judge Baer cited,. among other things, defendants' decision to move to the United States to more effectively "promote their misleading perceptions on Wall Street," along with the "pervasiveness and coextensiveness of fraud in the United States and abroad to sustain Vivendi stock price and the use of instrumentalities of interstate commerce to promulgate the alleged fraud."[56]

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to justify individual actions); *Genden*, 114 F.R.D. at 53 ("[i]n an action such as this one where the claims are numerous and relatively small, individual claimants are unlikely to take on the burden and cost of litigation. The superiority of the class action in such cases is beyond dispute").

[55] *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991) (subject matter jurisdiction is appropriate "if the defendant's conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad").

[56] *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (HB), 2003 U.S. Dist. LEXIS 19431, *22-23 (S.D.N.Y. Nov. 3, 2003) (citing *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 130-31 (2d Cir. 1998) (finding "jurisdiction over a predominantly foreign securities transaction . . . when, in addition to communications with or meetings in the United States, there has also been a transaction on a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress."); *S.E.C. v. Princeton Econ. Intern, Ltd.*, 84 F. Supp. 2d 452, 454 (S.D.N.Y. 2000) (assuming subject matter jurisdiction for conduct that was "more than merely preparatory" and was "a substantial or significant contributing cause to the losses"); *In re Gaming Lottery*, 58 F. Supp. 2d 62, 67 (same); *Leonard v. Garantia Banking Ltd.*, No. 98 Civ. 4848, 1999 U.S. Dist. LEXIS 16046, at *18 (S.D.N.Y. Oct. 19, 1999) ("This Court

Moreover, in denying defendants' motions for reconsideration, this Court recently refused to upset Judge Baer's ruling on subject matter jurisdiction, and declined to certify a Section 1292(b) appeal on the issue.[57]

Courts routinely certify classes that include foreign investors who purchased their shares on a foreign exchange.[58] For example, in a decision that the Second Circuit declined to disturb, Judge Berman addressed the issue of whether a proposed class of purchasers of Nortel Networks stock, which included foreign purchasers who had purchased their shares on a foreign exchange, should be certified under Rule 23. Judge Berman held that where – as

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finds that the trading of ADRs on the NYSE satisfies the conduct test, and any 'tipping of the scales' which might be required by [Europe and Overseas Commodity Traders, S.A.] is present in the use of United States banks and wire-transfer systems.")).

[57] Transcript of Proceedings, Sept. 20, 2004 at 4.

[58] *See, e.g., In re Gaming Lottery*, 58 F. Supp. 2d 62, 76 (S.D.N.Y. 1999) (certifying class of both U.S. and Canadian residents in a suit against a Canadian corporation; "the factors weighing in favor of jurisdiction in this case extend beyond [defendant's] mere ownership of American assets, and relate to an alleged fraudulent scheme in which persons purchasing on American and Canadian exchanges were, in similar measure and in similar fashion, the intended as well as the actual victims of an integrated fraudulent scheme"); *see also Krangel v. Golden Rule Res., Inc.*, 194 F.R.D. 501, 502, 506, 510 (E.D. Pa. 2000) (certifying a class consisting of both U.S. and Canadian investors who purchased the stock of a Canadian corporation on the Toronto Stock Exchange); *Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1139 (C.D. Cal. 1999) (certifying a class consisting of American and German investors, where defendant's stock was traded on the NASDAQ, the EASDAQ and the Vancouver Stock Exchange; "[i]t is evident there is no *per se* rule against the certification of a class whose members are both foreign and American investors. Nor is there a prohibition against having a mix of foreign and American investors serve as class representatives."); *Jordan v. Global Natural Res., Inc.*, 102 F.R.D. 45, 52 (S.D. Ohio 1984) (certifying a class that included the claims both foreign and U.S. purchasers against a U.K. corporation traded on the London Stock Exchange, and in over-the-counter markets in Germany and the United States).

in this case – the defendant foreign corporation allegedly "used its artificially inflated stock to fund an aggressive growth-by-acquisition strategy" and that "[m]any of these acquisitions involved properties in the United States," such factors supported the exercise of subject matter jurisdiction over the claims of foreign purchasers who had purchased their shares on a foreign exchange.[59] The *Nortel* court also noted that, as in this case, defendants had allegedly engaged in improper revenue recognition activities in the United States to boost its reported revenues.[60]

After reviewing the relevant Second Circuit precedents, the *Nortel* court held:

> Defendants' activities in the United States satisfy the test for subject matter jurisdiction. Among other things, [plaintiff] alleges that "defendants were consummating risky vendor financing deals in an effort to boost reported 'revenues' throughout the Class Period." (Compl. ¶ 64, at 26). According to [plaintiff], Defendants were extending vendor financing to "numerous U.S. customers that defendants knew to be uncreditworthy, so as to artificially inflate the Company's revenues." (Pl. Reply at 9); *see In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 73-75 (S.D.N.Y. 1999) ("Subject matter jurisdiction is thus supported by

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[59] *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855 (RMB), 2003 U.S. Dist. LEXIS 15702, at *22 (S.D.N.Y. Sept. 5, 2003) (certifying class that included foreign purchasers), *interlocutory rev. denied sub nom. Ontario Pub. Serv. Employees Union Pension Trust Fund v. Nortel Networks Corp.*, slip op., No. 03-8038 (2d Cir. Nov. 24, 2003) (Ex. A); *cf.* Complaint at ¶¶ 23, 26, 191 (alleging that defendants used Vivendi's artificially inflated stock to fund its own aggressive scheme to acquire tens of billions of dollars worth of U.S. companies, and how roughly 50% of Vivendi's business was in the U.S. by the middle of the Class Period).

[60] *Nortel* at *24; *cf.* Complaint at ¶¶ 169-80

> substantial fraudulent activity in the United States directly causing harm abroad, the manner in which the same fraudulent scheme allegedly straddled both sides of the border, and the degree of economic activity connecting [defendant] to the United States.").[61]

IV. CONCLUSION

As demonstrated above, this action satisfies all the requirements of Rules 23(a) and 23(b)(3). Therefore, plaintiffs respectfully request that the Court grant plaintiffs' motion for class certification and enter an order appointing Prigest S.A., Tocqueville Finance, Olivier M. Gerard, Retirement System for General Employees of the City of Miami Beach, Bruce Doniger and StoneRidge Investment Partners LLC as class representatives, and appointing Milberg Weiss Bershad & Schulman LLP and Abbey Gardy, LLP as class counsel.

Dated: October 20, 2004

Respectfully submitted,

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/s/ Brian C. Kerr

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[61] *Nortel* at *23-24 (citation omitted); *see also id.* at *20-21 (rejecting defendants' argument that issues of international comity or "judicial administration" justified refusal to exercise subject matter jurisdiction where the applicable standards for exercising jurisdiction were otherwise met).

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APPENDIX M

NOTICE OF PLAINTIFFS' SUBSTITUTED MOTION FOR CLASS CERTIFICATION, FILED JULY 15, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	Civil Action No. 02 Civ. 5571 (RJH/HBP)

NOTICE OF PLAINTIFFS' SUBSTITUTED MOTION FOR CLASS CERTIFICATION

PLEASE TAKE NOTICE that, upon the accompanying memorandum of law and all prior papers and proceedings had herein, Olivier M. Gerard, the Retirement System for General Employees of the City of Miami Beach, Bruce Doniger, Gerard Morel, Capital Invest Die Kapitalanlagegesellschaft der Bank Austria Creditanstalt Gruppe GmbH (in its capacity as manager of and attorney-in-fact for Apk EU-Big Caps Fund) and William Cavanagh, on behalf of themselves and all others similarly situated, will move this Court, before the Honorable Richard J. Holwell of the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York 10007, for an Order pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3):

(i) certifying a class consisting of all persons who purchased or otherwise acquired the ordinary shares or American Depositary Shares of Vivendi Universal, S.A. during the period between October 30, 2000 and August 14, 2002, inclusive; excluded from the class are defendants, the members of their families, any entity in which any defendant has a controlling interest, or which is a parent or subsidiary of, or which is controlled by, Vivendi Universal, S.A., and the officers, directors, affiliates, legal representatives, heirs, predecessors, successors or assigns of any of the defendants;

(ii) appointing Olivier M. Gerard, the Retirement System for General Employees of the City of Miami Beach, Bruce Doniger, Gerard Morel, Capital Invest Die

Kapitalanlagegesellschaft der Bank Austria Creditanstalt Gruppe GmbH (in its capacity as manager of and attorney-in-fact for Apk EU-Big Caps Fund) and William Cavanagh as class representatives, and appointing Milberg Weiss Bershad & Schulman LLP and Abbey Gardy, LLP as class counsel; and

(iii) granting such other relief as may be just and proper.

Dated: July 15, 2005

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APPENDIX N

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SUBSTITUTED MOTION FOR CLASS CERTIFICATION, FILED JULY 15, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	Civil Action No. 02 Civ. 5571 (RJH/HBP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SUBSTITUTED MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Olivier M. Gerard, the Retirement System for General Employees of the City of Miami Beach (*Miami Beach*), Bruce Doniger, Gerard Morel, Capital Invest Die Kapitalanlagegesellschaft der Bank Austria Creditanstalt Gruppe GmbH (in its capacity as manager of and attorney-in-fact for Apk EU-Big Caps Fund) (*Capital Invest*) and William Cavanagh (*plaintiffs* or *proposed class representatives*) respectfully submit this memorandum of law in support of their substituted motion for certification of a class (the *Class*) for the prosecution of their federal securities claims against defendant Vivendi Universal, S.A. (*Vivendi*) and its two most senior former officers: defendants Jean-Marie Messier (former CEO) and Guillaume Hannezo (former CFO) (*Individual Defendants*).[1]

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[1] Consistent with plaintiffs' prior representations to the Court and defendants, and pursuant to the Court's Order of July 6, 2005, plaintiffs hereby file their substituted motion for class certification, which drops original movants who no longer seek class representative status and adds as additional movants those non-original movants who now seek class representative status. The substituted motion therefore now correctly identifies the names of those persons and entities offered as class representatives in this action. Plaintiffs note, however, that they have not, consistent with customary practice and their understanding of the Court's June 1, 2005 Order, sought to amend the previously filed motion by adding detailed discussion of the background and qualifications of each proposed class representative, inasmuch as (a) class discovery (including depositions) has not yet been completed, and (b) issues relating to the adequacy of individual proposed class representatives are customarily addressed in defendants' opposition papers (if any) and plaintiffs' reply papers, based upon the full record developed in the course of class discovery. Plaintiffs also note that, pursuant to the Court's June 1, 2005 Order (as amended by Order dated July 8, 2005), the Court has directed that with respect to the possible submission of expert opinions on the motion. defendants are to submit their expert affidavits (if any) by September 12, 2005, and plaintiffs are to submit their expert affidavits (if any) by October 31, 2005.

Plaintiffs allege that defendants' public statements during the *Class Period* (October 30, 2000 through August 14, 2002, inclusive) were materially false and misleading because they failed to disclose, among other things, that: (1) Vivendi's corporate acquisition spree had brought Vivendi to the brink of a potentially catastrophic liquidity crisis; (2) Vivendi had wrongfully failed to write-down billions of dollars of impaired goodwill from prior acquisitions (e.g., Canal Plus and U.S. Filter); and (3) although it consolidated the financial results (including billions of dollars in revenue) of several majority owned subsidiaries (e.g., Cegetel and Maroc Telecom), Vivendi did not have access to the cash flows of these entities. As a result of Vivendi's materially false and misleading statements and omissions, plaintiffs allege that the prices of Vivendi securities were artificially inflated during the Class Period, thereby causing damage to members of the Class who purchased such securities in reliance on the integrity of the market.

The Second Circuit emphatically favors the use of class actions for resolution of securities claims.[2] To that end, the Second Circuit has directed courts to interpret and apply Rule 23 liberally, rather than restrictively.[3] Accordingly, in

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[2] *Green v. Wolf Corp.*, 406 F.2d 291, 296-97 (2d Cir. 1968) (Rule 23 "illustrates the need for an effective use of class actions in securities act litigation").

[3] *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2d Cir. 1990) ("In light of the importance of the class action device in securities fraud suits, these factors are to be construed liberally."); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972) (courts must be "mindful of the admonition of liberality toward demands for class suit status in securities litigation"); *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965) ("The usefulness of the representative action as a device for the aggregation of small claims is 'persuasive of the necessity of a liberal construction of . . . Rule 23.'") (citation omitted); *see also Dietrich v. Bauer*, 192 F.R.D. 119, 122 (S.D.N.Y. 2000) (Rule 23 is to be applied in a liberal fashion when considering claims brought under the federal securities laws); *In re*

securities cases, "when a court is in doubt as to whether or not to certify a class action, the court should err in favor of allowing the class to go forward."[4]

As set forth below, movants have overwhelmingly satisfied the requirements of Rule 23. The proposed class representatives and their counsel will fairly and adequately protect the interests of the Class they seek to represent, which

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Oxford Health Plans, Inc. Sec. Litig., 191 F.R.D. 369, 373 (S.D.N.Y. 2000) ("our Court of Appeals has directed district courts to avoid applying Rule 23 under a restrictive interpretation"); *In re Blech Sec. Litig.*, 187 F.R.D. 97, 102 (S.D.N.Y. 1999) ("Class action treatment of related claims is particularly appropriate when plaintiffs seek redress for violations of the securities laws. It is well recognized that private enforcement of these laws is a necessary supplement to government regulation."); *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 54 (S.D.N.Y. 1993) (there is a "preference for class certification in securities cases" as certification is important "for small securities holders located throughout the country"); *Epifano v. Boardroom Bus. Prods., Inc.*, 130 F.R.D. 295, 298 (S.D.N.Y. 1990) ("There is a strong public policy in favor of private enforcement of the nation's securities laws . . . . A class action is both an effective and appropriate method for resolving securities law claims.").

[4] *Blech*, 187 F.R.D. at 102. By providing a single forum in which to litigate the same or similar claims, a class action also affords an indispensable mechanism for the conservation of judicial resources. *See In re Initial Public Offering Sec. Litig.*, 21 MC 92 (SAS), 2004 U.S. Dist. LEXIS 20497, *3 (S.D.N.Y. Oct. 13, 2004) ("'The class action device was designed to promote judicial efficiency and to provide aggrieved persons a remedy when individual litigation is economically unrealistic, as well as to protect the interests of absentee class members.'") (quoting 5 JAMES WM. MOORE, et al., MOORE'S FEDERAL PRACTICE ¶ 23.03 (3d ed. 2004); *see also Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) ("the effectiveness of the securities laws may depend in large measure on the application of the class action device"); *Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983) ("Separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts."). Rule 23 is, therefore, broadly structured so as to facilitate certification of class actions. "The interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." *Eisenberg*, 766 F.2d at 785 (quoting *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968)).

consists of all persons who purchased or otherwise acquired the common stock (ordinary shares) or American Depositary Shares (*ADSs*) of Vivendi during the Class Period. Each of the proposed class representatives' claims is typical. In this securities litigation, common questions predominate over any questions affecting only individual members of the Class. All members of the Class seek to prove the same misrepresentations and omissions. Co-Lead Counsel have vigorously pursued the interests of the Class throughout this litigation. Co-Lead Counsel have filed a First Amended Consolidated Class Action Complaint (*Complaint*), successfully prosecuted this case through the lead plaintiff appointment process, defeated defendants' motions to dismiss (and subsequent motions for reconsideration), and engaged in extensive discovery including the review of thousands of pages of documents. Furthermore, Co-Lead Counsel have responded to defendants' interrogatories and requests for production of documents, and the proposed class representatives have been deposed or will be appearing for deposition.

Accordingly, plaintiffs respectfully request that this action be certified as a class action.

II. PROCEDURAL HISTORY

Plaintiffs filed their original complaint in this action in July 2002, shortly after defendant Messier was forced to resign and Vivendi's new management acknowledged the existence of a "liquidity issue." Complaint at ¶ 110. On November 1, 2002, pursuant to the Private Securities Litigation Reform Act of 1995, Judge Baer appointed the Miami Group[5] and the Pearson-Doniger Family[6] as co-lead

[5] The Miami Group consisted of the Retirement System for General Employees of the City of Miami Beach, Olivier M. Gerard, Francois R. Gerard, Prigest S.A. and Tocqueville Finance S.A.

plaintiffs, and approved their selection of counsel, the firms of Milberg Weiss Bershad & Schulman LLP (*Milberg Weiss*)[7] and Abbey Gardy, LLP (*Abbey Gardy*).

Plaintiffs' Consolidated Class Action Complaint was filed on January 7, 2003. Each of the defendants moved to dismiss. On November 3, 2003, Judge Baer denied all motions to dismiss claims under Section 10(b) of the Securities Exchange Act of 1934. In particular, Judge Baer found that defendants' conduct in the United States was more than merely preparatory to the alleged fraudulent scheme, and that accordingly the Court had subject matter jurisdiction over the claims brought by foreign purchasers of Vivendi ordinary shares:

> Contrary to defendants' characterization, their conduct can hardly be deemed merely preparatory within the United States Given [individual defendants] Messier's and Hannezo's decision to move to the United States, allegedly to better direct corporate operations and more effectively promote misleading perceptions on Wall Street . . . one can reasonably infer that the alleged fraud on the American Exchange was a 'substantial' or 'significant contributing cause of [foreign investor's] decision[s] to purchase [Vivendi's] stock' abroad.[8]

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[6] The Pearson-Doniger Family consists of Bruce Doniger, Beatrice Doniger, Grandchildren's Trust by Bruce Doniger Trustee, Michael Doniger, Edward B. Brunswick, and Ruth Pearson Trust Pearson Trustee. The Pearson-Doniger Family originally included Alison Doniger, who has since withdrawn as a lead plaintiff.

[7] Formerly known as Milberg Weiss Bershad Hynes & Lerach LLP.

[8] *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571, 2003 U.S. Dist. LEXIS 19431, at *22-23 (S.D.N.Y. Nov. 4, 2003).

On September 21, 2004, this Court denied defendants' motions for reconsideration.[9]

On October 20, 2004, plaintiffs filed their original motion for class certification. On April 21, 2005, this Court granted the motions of named plaintiffs and proposed class representatives Prigest S.A. and Toqueville Finance S.A. to withdraw as named plaintiffs and proposed class representatives. That same day, the Court also granted the motions of Gerard Morel and Capital Invest to intervene as named plaintiffs for the purpose of allowing them to seek to become additional class representatives. After advising the Court that one of the proposed class representatives (StoneRidge Investment Partners, LLC) sought to withdraw due to unforeseen business-related developments in May 2005, by Order dated June 1, 2005 the Court granted plaintiffs permission to move to substitute an additional class representative by June 10, 2005. Plaintiffs moved thereafter to substitute William Cavanagh as an additional proposed class representative, and the Court granted that motion on July 6, 2005. As part of the Court's July 6, 2005 Order, the Court directed Mr. Cavanagh (and by implication all plaintiffs) to have a formal class certification motion on file by July 15, 2005.

III. ARGUMENT

A. The Requirements Of Rule 23

Federal Rule of Civil Procedure 23 governs class certification. To be certified, a putative class must meet all four prerequisites of Rule 23(a), as well as the requirements

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[9] Judge Baer granted plaintiffs leave to amend their claims under Section 14(a) of the 1934 Act, as well as their claims under Sections 11 and 12(a)(2) of the Securities Act of 1933, based on standing issues. Plaintiffs filed their amended complaint on November 24, 2003. The Court granted defendants' subsequent motions to dismiss plaintiffs' amended Section 14 claim.

of one of the three subsections of Rule 23(b). In this case, as in most cases seeking monetary damages, plaintiffs must demonstrate that the class meets the four requirements of Rule 23(a) – numerosity, commonality, typicality and adequacy[10] – and that the action is "maintainable" under Rule 23(b)(3).[11] Under Rule 23(b)(3), "common" issues of law or fact must "predominate over any questions affecting only individual members," and a class action must be demonstrably "superior" to other methods of adjudication.[12]

For the purposes of a class certification motion, plaintiffs' allegations are to be taken as true and the Court does not examine the merits of plaintiffs' case.[13] Thus, the focus of the Court's inquiry in deciding this motion is simply on whether the Rule 23 requirements have been met, and not on the merits of plaintiffs' claims.

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[10] *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999).

[11] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

[12] Fed. R. Civ. P. 23(b)(3).

[13] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (a motion for class certification "is not an occasion for examination of the merits of the case"); *Caridad*, 191 F.3d at 293 (2d Cir. 1999) ("In deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class."); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 279 (S.D.N.Y. 2003) ("At class certification, the court determines whether the requirements of Rule 23 are met, not whether the claims are adequately pleaded or who will prevail on the merits.").

B. Rule 23(a) Is Satisfied

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable

Rule 23 requires that the class must be "so numerous that joinder of all members is impracticable."[14] "Impracticability does not mean impossibility of joinder, but refers to the difficulty or inconvenience of joinder."[15] Although precise calculation of the number of class members is not required, and it is permissible for the court to rely on reasonable inferences drawn from available facts, numbers in excess of forty generally satisfy the numerosity requirement.[16]

Throughout the Class Period, Vivendi's ADSs were actively traded on the New York Stock Exchange, in a well-developed and efficient market. Complaint at ¶ 41. Vivendi's ordinary shares were actively traded on various overseas exchanges, including the EuroNext Paris S.A. (*Paris Bourse*), the London Stock Exchange and the Deutsche Boerse, also efficient markets. *Id.* As of December 31, 2001, the Company had more than 107 million ADSs, and more

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[14] Fed. R. Civ. P. 23(a)(1); *Maywalt*, 147 F.R.D. at 54.

[15] *In re Indep. Energy.*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002) (SAS) (citing *In re Avon Sec. Litig.*, No. 91 Civ. 2287, 1998 WL 834366, at *5 (S.D.N.Y. Nov. 30, 1998)).

[16] *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y. 1992); *see In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277, 280 (S.D.N.Y. 2002) (finding numerosity where the defendant had issued "[t]ens of millions" of ADSs in the United States); *see also In re Frontier Ins. Group Sec. Litig.*, 172 F.R.D. 31, 40 (E.D.N.Y. 1997) ("In securities fraud actions brought against publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period.").

than 1 billion ordinary shares outstanding. *Id.* Therefore, the numerosity of the Class cannot be disputed. *Id.*[17]

2. There Are Questions Of Law Or Fact Common To Members Of The Class

Rule 23(a) requires a showing that common issues of fact or law affect all class members.[18] A single common question may be sufficient to satisfy the commonality requirement.[19] "The critical inquiry is whether the common questions are at the core of the cause of action alleged."[20]

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[17] *See, e.g., Dietrich*, 192 F.R.D. at 123 (allegations in a securities action that the defendant company was traded on the NASDAQ National Market System, had 22.5 million shares outstanding held by approximately 522 record holders were facts reasonable to "infer that the class is sufficiently large to meet Rule 23(a)'s numerosity requirement"); *In re Oxford Health*, 191 F.R.D. at 374 ("Here, because Oxford stock was traded in high volume during the class period, the precise number of class members could be, and very likely is, numbered in the thousands . . . [t]he [n]umerosity requirement is satisfied."); *see also Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1039 (5th Cir. 1981) (finding that numerosity is generally presumed when a claim involves a nationally traded security).

[18] Fed. R. Civ. P. 23(a)(2); *Trief*, 144 F.R.D. at 198.

[19] *German v. Federal Home Loan Mortgage Corp.*, 885 F. Supp. 537, 553 (S.D.N.Y. 1995); *see also Cutler v. Perales*, 128 F.R.D. 39, 44 (S.D.N.Y. 1989) (commonality "does not mean that all issues must be identical as to each (class] member, but it does require that plaintiffs identify some unifying thread among the members' claims that warrants class treatment'") (quoting *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986)).

[20] *D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 456 (E.D.N.Y. 1996) (quotation omitted); *see In re Avon Sec. Litig.*, No. 91 Civ. 2287 (LMM), 1998 U.S. Dist. LEXIS 18642, at *15 (S.D.N.Y. Nov. 19, 1998) ("Commonality does not mandate that all class members make identical claims and arguments") (citation omitted); *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1334 (S.D.N.Y. 1988) ("not every question of fact or law raised need be common to every member of the class"); *see also In re VMS Sec. Litig*, 136 F.R.D. 466, 473 (N.D. Ill. 1991) (factual variations among class members' grievances will not defeat the commonality

The commonality requirement is generally considered a low hurdle that "has been applied permissively by courts in the context of securities fraud litigation."[21] In general, where putative class members have been injured by similar material misrepresentations and omissions, the commonality requirement is satisfied.[22]

In this case, the common legal and factual issues include: (i) whether defendants violated the securities laws by the acts and conduct alleged in the Complaint; (ii) whether defendants issued false and misleading statements during the Class Period; (iii) whether defendants acted with scienter in issuing materially false and misleading statements; (iv) whether the market prices of Vivendi ordinary shares and ADSs during the Class Period were artificially inflated because of defendants' misconduct; and (v) whether the members of the Class sustained damages and, if so, what is the appropriate measure of those damages.[23]

3. Plaintiffs' Claims Are Typical Of Those Of The Members Of The Class

Rule 23(a)(3) requires that the claims asserted by the proposed class representative be typical of the claims of each

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requirement so long as the claims arise from a "common nucleus of operative facts").

[21] *In re Blech*, 187 F.R.D. at 104.

[22] *See, e.g., In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 426 (S.D.N.Y. 1986) ("The nub of plaintiffs' claims is that material information was withheld from the entire putative class in each action, either by written or oral communication. Essentially, this is a course of conduct case, which as pled satisfies the commonality requirement of Rule 23 . . . ."); *see also Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975) ("Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable . . . .").

[23] Complaint at ¶ 45.

member of the class.[24] A representative's claims are typical if they arise from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.[25] "Typicality under Rule 23 requires that a class representative 'have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.'"[26] "[T]ypical," therefore, does not mean "identical."[27]

The typicality requirement of Rule 23(a)(3) is not demanding.[28] Courts have recognized that this requirement "can be met with surprising ease in most cases, because the majority of class action decisions support the view that when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is met."[29] A plaintiff's claims satisfy the typicality requirement if, as in this case, they "arise[] from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."[30]

Moreover, the "typicality requirement is not defeated by minor variations in the fact patterns of individual class

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[24] Fed. R. Civ. P. 23(a)(3).

[25] *See In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992).

[26] *In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126 (S.D.N.Y. 1997) (citing *Daniels v. Amerco*, No. 81 Civ. 3801 (RLC), 1983 U.S. Dist. LEXIS 18670 (S.D.N.Y. Mar. 10, 1983)).

[27] *Trief*, 144 F.R.D. at 200.

[28] *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001).

[29] *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 139 (D.N.J. 1984), *rev'd and remanded on other grounds*, 843 F.2d 1537 (3d Cir. 1988) (citation omitted).

[30] *In re Drexel Burnham*, 960 F.2d at 291.

member's claims."[31] Thus, because the typicality inquiry focuses on the nature of the claims asserted, any factual difference involving the date, type and manner by which the investor acquired his securities, the investor's perception of the transaction, or even the information furnished to him or her at the time of the purchase will not destroy typicality if each class member was the victim of the same material omissions and the same consistent course of conduct.[32] Accordingly, the commonality and typicality requirements "'tend to merge' because '[b]oth serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence.'"[33]

The proposed class representatives' claims in this case are clearly typical of the claims of the Class because they arise out of the same uniform pattern of conduct – i.e., defendants' failure to disclose that Vivendi's operations and financial condition were dramatically weaker than what their public statements portrayed. Thus, the proposed class representatives stand in precisely the same position as do other investors who acquired Vivendi stock and ADSs during the Class Period. Moreover, the proposed class representatives and each of the Class members claim that, as

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[31] *Abdul-Malik v. Coombe*, No. 96 Civ. 1021 (DLC), 1996 U.S. Dist. LEXIS 18203, at *6 (S.D.N.Y. Dec. 5, 1996); *see also* 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.13, at 329 (4th ed. 2002).

[32] *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 428 (S.D.N.Y. 1986); *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981); *Oscar Gruss & Son v. Geon Indus., Inc.*, 75 F.R.D. 531, 534-35 (S.D.N.Y. 1977).

[33] *Caridad*, 191 F.3d at 291 (alterations in original) (quoting *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982)).

a result of defendants' actions, they have been financially injured.[34]

4. Plaintiffs Will Fairly And Adequately Protect The Interests Of The Class

Plaintiffs must also show that "the representative parties will fairly and adequately protect the interests of the class."[35] To do so, plaintiffs must demonstrate that: (i) the plaintiff's interests are not antagonistic to the other members of the Class; and (ii) the representative party's attorney is qualified, experienced and generally able to conduct the litigation.[36]

First, as discussed above, the proposed class representatives' interests are co-extensive and do not conflict with class members' interests, and are typical of the claims of the other members. Plaintiffs and all class members have suffered losses due to their purchase of Vivendi securities. They have been injured by the same wrongful course of conduct of the defendants, and it is in the proposed class representatives' interests to vigorously prosecute this action on behalf of the Class.

With regard to the second component, proposed class counsel (Milberg Weiss and Abbey Gardy) are experienced class action attorneys who have qualified as lead counsel in numerous nationwide class actions (including this one). The proposed class counsel have substantial expertise in the

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[34] *See, e.g., In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 40-41 (E.D.N.Y. 1991) ("Plaintiffs' claims are typical of those of absent class members. They allege injury resulting from the same course of conduct that injured the absent class members and are based on the same theories of recovery.").

[35] Fed. R. Civ. P. 23(a)(4).

[36] *See In re Drexel Burnham*, 960 F.2d at 291; *In re Oxford Health*, 191 F.R.D. at 376; *Daniels v. City of N.Y.*, 198 F.R.D. 409, 414 (S.D.N.Y. 2001); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 114 F.R.D. 48, 53 (S.D.N.Y. 1987).

investigation and prosecution of complex class actions, including those involving securities fraud.

C. This Action Meets The Requirements Of Rule 23(b)(3)

Once plaintiffs demonstrate that the proposed class satisfies the elements of Rule 23(a), they must establish that the action is "maintainable" as defined by Rule 23(b). Rule 23(b) provides that "an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition" one of three alternative definitions of maintainability is met. This proposed class action is maintainable under subsection (b)(3), which requires "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[37] Rule 23(b)(3) thus has two elements: "predominance" and "superiority."

The issues of predominance and superiority are not amenable to a bright line test. Rather, the inquiry under this subdivision is whether class certification will ensure economies of time and money by allowing a few representatives to proceed on behalf of a larger whole so that a class action would be the most efficient method of proceeding.[38]

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[37] Fed. R. Civ. P. 23(b)(3).

[38] *In re Lilco Sec. Litig.*, 111 F.R.D. 663, 668 (E.D.N.Y. 1986); *see also* Fed. R. Civ. P. 23(b)(3) Advisory Committee Note (acknowledging that class action is an appealing tool for adjudicating cases of "fraud perpetrated on numerous persons by the use of similar misrepresentations").

1. Common Questions Of Law Or Fact Predominate

"In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof."[39] "Courts generally focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions."[40] Accordingly, as the Supreme Court noted in *Amchem*, "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud."[41]

As set forth above, the central focus of this litigation is defendants' knowing failure to disclose that Vivendi's operations and financial condition were dramatically weaker than what they led the public to believe. The uniform applicability of these liability issues is "readily susceptible to class-wide proof."[42] In fact, plaintiffs' allegations in this case

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[39] *In re VISA Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (quotation marks and citation omitted); *see also* 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1778 at 528 (2d ed. 1986) (predominance requirement is generally found to be satisfied "[w]hen common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication").

[40] *In re Prudential Sec. Inc. Ltd.. P'ships Litig.*, 163 F.R.D. 200, 206 (S.D.N.Y. 1995) (quoting *Dura-Bilt Corp.*, 89 F.R.D. at 93).

[41] *Amchem Prods.*, 521 U.S. at 625; *see also In re Lilco*, 111 F.R.D. at 668; *In re Arakis Energy Corp. Sec. Litig.*, No. 95-CV-3431 (ARR), 1999 U.S. Dist. LEXIS 22246, at *37 (E.D.N.Y. Apr. 23, 1999) ("In securities fraud class actions in which the fraud is alleged to have been carried out through public communications to a wide variety of market participants, common issues of law and fact will generally predominate over individual issues.").

[42] *In re Baldwin-United*, 122 F.R.D. at 427; *In re Prudential*, 163 F.R.D. at 207 ("'[I]t would be folly to force each [investor] to prove the nucleus

constitute the type of common conduct that fits well within the Second Circuit's standards for class certification under Rule 23(b)(3).[43]

Moreover, whether any class member relied on a particular representation or material omission is not an issue in this case because reliance is presumed under the fraud on the market doctrine. As the Supreme Court explained:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.[44]

Thus, the fraud on the market doctrine dispenses with the requirement that an investor prove that he or she was aware of a particular misstatement, or that he or she directly relied on it.[45] As explained by the Second Circuit, the fraud on the market doctrine "creates a rebuttable presumption that (1) misrepresentations by an issuer affect the price of securities traded in the open market, and (2) investors rely on the market price of securities as an accurate measure of their intrinsic value."[46]

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of the alleged fraud again and again.'" (quoting *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 140 F.R.D. 425, 431 (D. Ariz 1992)).

[43] *Green*, 406 F.2d at 300-301; *In re Symbol Techs. Class Action Litig.*, 92-CV-3492 (JG), 1996 U.S. Dist. LEXIS 3297, *4 (E.D.N.Y. Mar. 18, 1996).

[44] *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988) (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

[45] *Id.* at 246-47.

[46] *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 77 (2d Cir. 2004).

Rebutting the presumption of reliance is extremely difficult. As stated by the Supreme Court, "[i]t has been noted that 'it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?'"[47] "Requiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed . . . or if the misrepresentation had not been made . . . would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market."[48] Thus, at the class certification stage, defendants cannot rebut the presumption of reliance, challenge the typicality of plaintiffs' claims, nor raise reliance as a potential individual issue.[49]

2. A Class Action Is The Superior Method Of Adjudication

The superiority prong of Rule 23(b)(3) requires a court to consider whether a class action is superior to other methods of adjudication.[50] The class action device is particularly appropriate for addressing the claims at issue in this case. The claims involve a large number of investors who are geographically dispersed, and whose relatively small claims make it prohibitively expensive to seek recovery through individual litigation.[51]

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[47] *Basic*, 485 U.S. at 246-47 (citations and footnotes omitted).

[48] *Id.* at 244 (other citations omitted); *see also Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975) (reliance established by "proof of materiality [of alleged misrepresentations and omissions] coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock") (quoted approvingly in *Basic*, 485 U.S. at 245).

[49] *See Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999).

[50] Fed. R. Civ. P. 23(b)(3); see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).

[51] *See Califano v. Yamasaki*, 442 U.S. 682, 690 (1979) (duplication of actions is the very "evil that Rule 23 was designed to prevent"); *Green v.*

In addition, the four factors specified in Rule 23(b)(3) favor class certification.[52] First, individual members do not have an interest in controlling the action. Although a few Class members may have suffered damages substantial enough that might make it economically viable for them to bring their own suits (e.g., Liberty Media Corp.), this fact does not warrant a finding that Class members have an interest in individually controlling the litigation so that the action may not be certified under Rule 23(b)(3).[53] Second, plaintiffs are unaware of any other class litigation seeking recovery from defendants based on this conduct. Third, it is clearly desirable to concentrate litigation on behalf of all Class members in one forum. Inconsistent adjudications will be avoided, thus promoting the fair and efficient use of the judicial system. Fourth, this case presents no unusual difficulties in the management of the action. Plaintiffs' counsel and the Court have handled numerous similar actions and the appropriate procedures and techniques for the management of such suits are well-established. Moreover, the flexibility provided to the Court under Rule 23 will

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Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968) ("the alternatives [to a class action] are either no recourse for thousands of [investors]" or "a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake"); *see also Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983) ("Separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts.").

[52] Fed. R. Civ. P. 23(b)(3).

[53] As one commentator has noted, and as the cases cited above demonstrate, the reference in Rule 23(b)(3) to the interest of individual class members in controlling the litigation relates to the interests of most or all of the class members, rather than the interests of only a few, since if only a small fraction of the class has an interest in controlling the litigation, their interest may be served by opting out of the suit, or by entering an appearance under Rule 23(c)(2) or by intervening. 2 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.29 at 256 (4th ed. 2002).

enable it to address and resolve any management difficulties if they should arise.[54]

Thus, it is clear that securities suits such as this one easily satisfy the superiority requirement of Rule 23. Moreover, the alternatives to a class action are either no recourse for thousands of investors or a multiplicity of scattered suits resulting in the inefficient administration of litigation that follows.[55]

D. Foreign Investors Who Purchased Vivendi Securities On Foreign Exchanges Are Proper Class Members

The Court has already concluded that, under the "conduct test" — which the Second Circuit has adopted to determine when extraterritorial application of the federal securities laws is warranted[56] – there is subject matter

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[54] Fed. R. Civ. P. 23(c); Fed. R. Civ. P. 23(d).

[55] *Green*, 406 F.2d at 296 ("[A] class action may well be the appropriate means for expeditious litigation of the issues, because a large number of individuals may have been injured, although no on person may have been damaged to a degree which would have induced him to institute litigation solely on his own behalf."); *In re Blech*, 187 F.R.D. at 107 (superiority requirement satisfied as "[m]ultiple lawsuits would be costly and inefficient" and "although a large number of individuals may have been injured, no one person may have been damaged to a degree which would induce him to institute litigation solely on his own behalf"); *Bresson v. Thomson McKinnon Sec. Inc.*, 118 F.R.D. 339, 345 (S.D.N.Y. 1988) (average investment of $8,600 would probably not be deemed sufficient to justify individual actions); *Genden*, 114 F.R.D. at 53 ("[i]n an action such as this one where the claims are numerous and relatively small, individual claimants are unlikely to take on the burden and cost of litigation. The superiority of the class action in such cases is beyond dispute").

[56] *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991) (subject matter jurisdiction is appropriate "if the defendant's conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad").

jurisdiction over the claims brought by foreign plaintiffs. In denying defendants' motions to dismiss, Judge Baer cited, among other things, defendants' decision to move to the United States to more effectively "promote their misleading perceptions on Wall Street," along with the "pervasiveness and coextensiveness of fraud in the United States and abroad to sustain Vivendi stock price and the use of instrumentalities of interstate commerce to promulgate the alleged fraud."[57] Moreover, in denying defendants' motions for reconsideration, this Court refused to upset Judge Baer's ruling on subject matter jurisdiction, and declined to certify a Section 1292(b) appeal on the issue.[58]

Courts routinely certify classes that include foreign investors who purchased their shares on a foreign exchange.[59] For example, in a decision that the Second

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[57] *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (HB), 2003 U.S. Dist. LEXIS 19431, *22-23 (S.D.N.Y. Nov. 3, 2003) (citing *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 130-31 (2d Cir. 1998) (finding "jurisdiction over a predominantly foreign securities transaction . . . when, in addition to communications with or meetings in the United States, there has also been a transaction on a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress."); *S.E.C. v. Princeton Econ. Intern, Ltd.*, 84 F. Supp. 2d 452, 454 (S.D.N.Y. 2000) (assuming subject matter jurisdiction for conduct that was "more than merely preparatory" and was "a substantial or significant contributing cause to the losses"); *In re Gaming Lottery*, 58 F. Supp. 2d 62, 67 (same); *Leonard v. Garantia Banking Ltd.*, No. 98 Civ. 4848, 1999 U.S. Dist. LEXIS 16046, at *18 (S.D.N.Y. Oct. 19, 1999) ("This Court finds that the trading of ADRs on the NYSE satisfies the conduct test, and any 'tipping of the scales' which might be required by [Europe and Overseas Commodity Traders, S.A.] is present in the use of United States banks and wire-transfer systems.")).

[58] See *In re Vivendi Universal, S.A. Sec. Litig.*, 02 Civ. 5571 (RJH), 2004 U.S. Dist. LEXIS 21230 (S.D.N.Y. Oct. 19, 2004).

[59] *See, e.g., In re Gaming Lottery*, 58 F. Supp. 2d 62, 76 (S.D.N.Y. 1999) (certifying class of both U.S. and Canadian residents in a suit against a Canadian corporation; "the factors weighing in favor of jurisdiction in this case extend beyond [defendant's] mere ownership of American assets, and relate to an alleged fraudulent scheme in which persons

Circuit declined to disturb, Judge Berman addressed the issue of whether a proposed class of purchasers of Nortel Networks stock, which included foreign purchasers who had purchased their shares on a foreign exchange, should be certified under Rule 23. Judge Berman held that where – as in this case – the defendant foreign corporation allegedly "used its artificially inflated stock to fund an aggressive growth-by-acquisition strategy" and that "[m]any of these acquisitions involved properties in the United States," such factors supported the exercise of subject matter jurisdiction over the claims of foreign purchasers who had purchased their shares on a foreign exchange.[60] The *Nortel* court also noted that, as in this case, defendants had allegedly engaged

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purchasing on American and Canadian exchanges were, in similar measure and in similar fashion, the intended as well as the actual victims of an integrated fraudulent scheme"); *see also Krangel v. Golden Rule Res., Inc.*, 194 F.R.D. 501, 502, 506, 510 (E.D. Pa. 2000) (certifying a class consisting of both U.S. and Canadian investors who purchased the stock of a Canadian corporation on the Toronto Stock Exchange); *Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1139 (C.D. Cal. 1999) (certifying a class consisting of American and German investors, where defendant's stock was traded on the NASDAQ, the EASDAQ and the Vancouver Stock Exchange; "[i]t is evident there is no *per se* rule against the certification of a class whose members are both foreign and American investors. Nor is there a prohibition against having a mix of foreign and American investors serve as class representatives."); *Jordan v. Global Natural Res., Inc.*, 102 F.R.D. 45, 52 (S.D. Ohio 1984) (certifying a class that included the claims both foreign and U.S. purchasers against a U.K. corporation traded on the London Stock Exchange, and in over-the-counter markets in Germany and the United States).

[60] *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855 (RMB), 2003 U.S. Dist. LEXIS 15702, at *22 (S.D.N.Y. Sept. 5, 2003) (certifying class that included foreign purchasers), *interlocutory rev. denied sub nom. Ontario Pub. Serv. Employees Union Pension Trust Fund v. Nortel Networks Corp.*, slip op., No. 03-8038 (2d Cir. Nov. 24, 2003) (Ex. A); *cf.* Complaint at ¶¶ 23, 26, 191 (alleging that defendants used Vivendi's artificially inflated stock to fund its own aggressive scheme to acquire tens of billions of dollars worth of U.S. companies, and how roughly 50% of Vivendi's business was in the U.S. by the middle of the Class Period).

in improper revenue recognition activities in the United States to boost its reported revenues.[61]

After reviewing the relevant Second Circuit precedents, the *Nortel* court held:

> Defendants' activities in the United States satisfy the test for subject matter jurisdiction. Among other things, [plaintiff] alleges that "defendants were consummating risky vendor financing deals in an effort to boost reported 'revenues' throughout the Class Period." (Compl. ¶ 64, at 26). According to [plaintiff], Defendants were extending vendor financing to "numerous U.S. customers that defendants knew to be uncreditworthy, so as to artificially inflate the Company's revenues." (Pl. Reply at 9); *see In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 73-75 (S.D.N.Y. 1999) ("Subject matter jurisdiction is thus supported by substantial fraudulent activity in the United States directly causing harm abroad, the manner in which the same fraudulent scheme allegedly straddled both sides of the border, and the degree of economic activity connecting [defendant] to the United States.").[62]

IV. CONCLUSION

As demonstrated above, this action satisfies all the requirements of Rules 23(a) and 23(b)(3). Therefore, plaintiffs respectfully request that the Court grant plaintiffs' substituted motion for class certification and enter an order

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[61] *Nortel* at *24; *cf.* Complaint at ¶¶ 169-80.

[62] *Nortel* at *23-24 (citation omitted); *see also id.* at *20-21 (rejecting defendants' argument that issues of international comity or "judicial administration" justified refusal to exercise subject matter jurisdiction where the applicable standards for exercising jurisdiction were otherwise met).

appointing Olivier M. Gerard, Miami Beach, Bruce Doniger, Gerard Morel, Capital Invest and William Cavanagh as class representatives, and appointing Milberg Weiss Bershad & Schulman LLP and Abbey Gardy, LLP as class counsel.

Dated: July 15, 2005

Respectfully submitted,

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EXHIBIT A

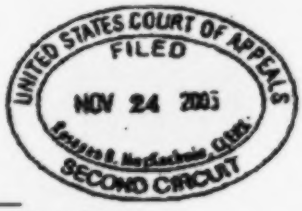
N-33

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 24th day of November two thousand and three,

Present:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. Guido Calabresi,
Hon. Chester J. Straub,
Circuit Judges.



Ontario Public Service Employees Union Pension Trust Fund, Eli Weinstein, On Behalf of Himself and All Others Similarly Situated, M&G Investment Management Limited and AXA Investment Managers U.K. Ltd.,

Plaintiffs-Respondents,

v. 03-8038

Nortel Networks Corporation, John Andrew Roth, William F. Connor, Chahram Bolouri and Frank Dunn,

Defendants-Petitioners

Defendants-Petitioners petition for permission to appeal the district court's class certification order pursuant to Federal Rule of Civil Procedure 23(f). Upon due consideration, it is ORDERED that the petition is denied because Petitioners

have not demonstrated either that: 1) the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision was questionable; 2) the order implicates a legal question about which there is a compelling need for immediate resolution; or 3) the existence of special circumstances warranting an immediate appeal. *See Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139-40 (2d Cir. 2001).

FOR THE COURT:

/s/ By: Lucille Carr
Roseann B. MacKechnie,
Clerk

SAOCG

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Memorandum of Law in Support of Plaintiffs' Substituted Motion for Class Certification has been served upon the following parties via hand delivery on this 15th day of July, 2005:

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APPENDIX O

VIVENDI UNIVERSAL, S.A.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SUBSTITUTED MOTION FOR CLASS CERTIFICATION, FILED OCTOBER 5, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	Civil Action No. 02 Civ. 5571 (RJH/HBP)

VIVENDI UNIVERSAL, S.A.'s MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SUBSTITUTED MOTION FOR CLASS CERTIFICATION

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October 5, 2005

Citation Conventions

The following conventions will be used throughout this Memorandum:

- "Pltf. Br." for references to the Memorandum of Law in Support of the Plaintiffs Substituted Motion for Class Certification, dated July 15, 2005.
- "FACC" for references to the First Amended Consolidated Complaint, dated November 24, 2003.
- "Vivendi" or the "Company" for references to Vivendi Universal, S.A.
- "Seagram" for references to The Seagram Company Ltd.
- "Canal Plus" for references to Canal Plus, S.A.
- "RSMB" for references to the Retirement System for the General Employees of the City of Miami Beach.
- "Apk" for references to Apk Pensionskasse.
- "NYSE" for references to the New York Stock Exchange.
- "Audit Decl." for references to the Declaration of Bernard Audit, dated September 27, 2005.
- "Bisiaux Decl." for references to the Declaration of Francois Bisiaux, dated September 30, 2005.
- "Carcassonne Decl." for references to the Declaration of Guy Carcassonne, dated September 23, 2005.

- "Cohen Decl." for references to the Declaration of Daniel Cohen, dated October 3, 2005.

- "de La Pradelle Decl." for references to the Declaration of Géraud de Geouffre de La Pradelle, dated September 29, 2005.

- "Gompers Decl." for references to the Declaration of Paul A. Gompers, dated October 3, 2005.

- "Heiser Decl." for references to the Declaration of Cécile Heiser, dated September 29, 2005.

- "Herbst Decl." for references to the Declaration of Christian Herbst, dated October 1, 2005.

- "Rabinowitz Decl." for references to the Declaration of Laurence Rabinowitz, Q.C., dated September 29, 2005.

- "Renard-Payen Decl." for references to the Declaration of Olivier Renard-Payen, dated September 27, 2005.

- "Terré Decl." for references to the Declaration of Francois Terré, dated September 30, 2005.

- "Wegen Decl." for references to the Declaration of Gerhard Hermann Otto Wegen, dated September 27, 2005.

- "Zach Decl." for references to the Declaration of Olivia J. Zach, dated October 5, 2005.

- "Cavanagh Tr." for references to the official transcript of the deposition of William Cavanagh, dated July 29, 2005, attached as Exhibit 32 to the Zach Decl.

- "Doniger Tr." for references to the official transcript of the deposition of Bruce Doniger, dated May 17, 2005, attached as Exhibit 37 to the Zach Decl.

- "Gerard Tr." for references to the official transcript of the deposition of Olivier Marie-Guillaume Gerard, dated June 24, 2005, attached as Exhibit 6 to the Zach Decl.

- "Kellner Tr." for references to the official transcript of the deposition of Thomas Kellner, dated September 19, 2005, attached as Exhibit 14 to the Zach Decl.

- "Morel Tr." for references to the official transcript of the deposition of Gerard Morel, dated May 25, 2005, attached as Exhibit 11 to the Zach Decl.

- "Reisenberger Tr." for references to the official transcript of the deposition of Irene Reisenberger, dated May 27, 2005, attached as Exhibit 13 to the Zach Decl.

- "Rivera Tr." for references to the official transcript of the deposition of Rick Rivera, dated May 20, 2005, attached as Exhibit 34 to the Zach Decl.

- "7/25/05 Hearing Tr." for references to the transcript of Oral Argument Before Honorable Henry B. Pitman United States Magistrate Judge, dated July 25, 2005, attached as Exhibit 1 to the Zach Decl.

- "5/24/05 Hearing Tr." for references to the transcript of Conference Before Honorable Henry B. Pitman United States Magistrate Judge, dated May 24, 2005, attached as Exhibit 5 to the Zach Decl.

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INTRODUCTION AND SUMMARY

Plaintiffs seek certification of a class "of all persons who purchased or otherwise acquired the common stock (ordinary shares) or American Depository Shares (*ADSs*) of Vivendi [Universal, S.A.] during the Class Period". (Pltf. Br. 3.) Vivendi Universal, S.A. came into existence in December 2000, following the merger of Vivendi, S.A., Seagram and Canal Plus. In connection with the merger, a series of exchanges was effected whereby holders of common stock and/or ADSs of Vivendi, S.A., Canal Plus and Seagram each received Vivendi Universal, S.A. common stock or ADSs. In addition, following the merger, many investors in Europe, North America and elsewhere purchased and sold Vivendi common stock on the Paris Bourse or other foreign exchanges or purchased and sold Vivendi ADSs on the NYSE. Consequently, the proposed class definition includes a geographically-dispersed mix of individuals and entities who acquired different Vivendi securities at different times and in different ways.

Three claims remain against Vivendi in the FACC:

- A claim under Sec. 11 (Count I) and a claim under Sec. 12(a) (Count II) of the 1933 Securities Act, brought on behalf of all persons who acquired Vivendi common stock pursuant to the registration statement and/or prospectus issued in connection with the merger; and

- A claim under Sec. 10(b) and Rule 10b-5 of the 1934 Securities Exchange Act (Count V of the FACC), brought on behalf of all persons who acquired either Vivendi ADSs or Vivendi common stock, by whatever means, during the proposed class period.

In the FACC, plaintiffs proposed to press those claims against Vivendi on behalf of a "Purchaser Class" and two subclasses. (See FACC ¶ 1.) After the dismissal of plaintiffs' claim under Sec. 14(a) of the Securities Exchange Act (see 11/3/03 Order at 10-11), only the "Merger Subclass", which consists of the merger exchanges described above, remains viable. (See FACC ¶ 1.) Plaintiffs' Substituted Motion for Class Certification, however, contains no mention of any subclasses. Rather, plaintiffs state that they seek certification of a broad, undifferentiated class of security holders, regardless of the type of claim asserted, type of security at issue, its form of acquisition, the location of any exchange or each putative class member's country of residence. That is not an appropriate class.

First, it is improper to group all Vivendi security holders and worry about the differences later, as plaintiffs urge the Court to do. As a threshold matter, there is no single "worldwide market" for Vivendi securities. There are two distinct markets – one in Europe for common stock and one in the U.S. for ADSs. Consequently, investors in Vivendi common stock and Vivendi ADSs should have their claims treated separately in putative subclasses.[1]

Second, the claims of foreign holders of Vivendi common stock (or ADSs) cannot be resolved through a Rule 23 opt-out class action because the French courts (and those of other European countries) will not give preclusive effect to any judgment by this Court. Even if the Court were to

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[1] "The Second Circuit has encouraged district courts to 'take full advantage of [Rule 23(c)(4)] to certify separate issues in order ... to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies'." See Jones v. Ford Motor Credit Co., No. 00 Civ. 833 (RJH) KNF, 2005 WL 743213, at *24 (S.D.N.Y. Mar. 31, 2005) (quoting Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 167 (2d Cir. 2001). Each subclass needs only to meet the requirements of Rule 23(a) generally. See Warren v. Xerox Corp., No. 01-CV-2909 (JG), 2004 WL 1562884, at *17 (E.D.N.Y. Jan. 26, 2004).

approve a settlement that included a release of all claims against Vivendi, the Company could not enforce that judgment in France given the particularities of French law addressed in detail by Vivendi's French law experts. Foreign investors are not left without recourse: indeed, what is effectively a class action alleging claims virtually identical to those at issue here is now pending against Vivendi in France. Even if the claim preclusion problem were overlooked, including any European purchasers in the proposed class would create unresolvable problems concerning notice and manageability. Only North American residents are proper members of any class or subclass.

Third, the class cannot include all acquirers of Vivendi Universal securities, including those that have alleged no damages. For example, putative class members who previously owned Vivendi, S.A. securities and exchanged those securities on a one-for-one basis for Vivendi Universal, S.A. shares should be excluded from any class. Similarly, persons who purchased Vivendi Universal securities during the class period and then sold them prior to any corrective disclosure ("in and out" purchasers), cannot be part of any class. Those persons were not misled and suffered no damages.

Fourth, class certification could be proper only for the following three subclasses:

(i) a subclass asserting the claims under Section 11 and Section 12(a)(2) of the 1933 Securities Act that remain at issue (Counts I and II), consisting of North American holders of Vivendi common stock who were damaged (excluding those who

exchanged Vivendi, S.A. shares for Vivendi Universal, S.A. shares);[2]

(2) a subclass asserting the claims under Section 10(b) of the 1934 Securities Exchange Act that remain at issue (Count V), consisting of North American holders of Vivendi ADSs who were damaged (excluding those who exchanged Vivendi, S.A. ADSs for Vivendi Universal, S.A. ADSs); and

(3) a subclass asserting the claims under Section 10(b) of the 1934 Securities Exchange Act that remain at issue (Count V), consisting of North American holders of Vivendi common stock who were damaged (excluding those who exchanged Vivendi, S.A. shares for Vivendi Universal, S.A. shares).

However, each of those three subclasses would need an adequate class representative, whose claims are typical of the class. As we discuss below, none of plaintiffs' class representative designees meets the applicable standards for the class each seeks to represent.

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[2] This should consist only of former Canal Plus shareholders. Seagram common shares were automatically exchanged for Vivendi Universal ADSs, except that Canadian residents who held Seagram shares could elect to receive exchangeable shares with Vivendi Universal voting rights. See Registration Statement and Prospectus, filed on October 30, 2000. A majority of the Seagram shareholders received Vivendi Universal ADSs, and their Section 11 and 12(a)(2) claims, along with those of all other persons who acquired Vivendi Universal ADSs in the merger, were dismissed. (See 11/3/03 Order.)

ARGUMENT

I. THIS COURT SHOULD NOT CERTIFY A SINGLE, WORLDWIDE CLASS.

Plaintiffs seek to have the Court certify a class of all persons who purchased or acquired any Vivendi securities during the class period. (See Pltf. Br. 1.) At least with respect to open market purchasers, plaintiffs' motion is premised on there being a "single worldwide market for Vivendi ordinary shares and ADSs which traded in tandem" during the proposed class period. (See FACC, ¶ 22.) That premise, however, is wrong.

Plaintiffs' allegation of a single, worldwide market – for which they offer no factual support[3] – has been analyzed for Vivendi by Professor Paul Gompers of Harvard Business School. Professor Gompers's analysis demonstrates that during the proposed class period, Vivendi securities were traded on two distinct markets, namely, the NYSE and the Paris Bourse.[4] The claims of each group of investors must therefore be dealt with separately, and cannot simply be lumped together as plaintiffs propose.

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[3] If plaintiffs, in their reply brief, should attempt to support this allegation with expert affidavits and other material (see 7/25/05 Hearing Tr. 84:14-85:8), the Court should ignore such an attempt. As the moving party, plaintiffs bear the burden of supporting their motion with all available material at the time their motion is filed. To allow brand new submissions on reply would eviscerate well-established burden allocation rules. (See infra pp. 24-27.)

[4] Vivendi securities were also traded in London, Toronto, Frankfurt, Amsterdam, and Berlin, as well as on the NASDAQ Europe. Because the combined monthly volume of Vivendi securities on those exchanges was less than two percent of the combined monthly volume of Vivendi ordinary shares traded on the Paris Bourse and Vivendi ADSs traded on the NYSE during the relevant period, Professor Gompers focused on the Paris and New York exchanges. (See Gompers Decl., n.4.)

First, investors in Vivendi ADSs and ordinary shares, each confronted different risks. In particular, ADS investors constantly faced foreign exchange risk – i.e., the possibility that any fluctuation in the dollar/Euro exchange rate would cause movements in the price of Vivendi ADSs, beyond price movements in Vivendi common stock. (See Gompers Decl. ¶¶ 11-13.)

Second, each group of investors bought and sold Vivendi securities in different ways and for different reasons. From December 2000 through June 2002, the monthly trading volume of ADSs steadily declined, as did the ratio of ADSs outstanding to ordinary shares outstanding. (See id. ¶ 14.) Those declines were largely attributable to an increase in the rate at which investors converted Vivendi ADSs into ordinary shares and in turn sold those shares on the Paris Bourse – a more liquid market for Vivendi securities. (See id. ¶ 15.) That significant and sustained increase in the ADS-to-ordinary-share conversion rate is inconsistent with there being one worldwide market in which Vivendi securities are perceived as substitutes. Investors clearly did not consider ADSs and ordinary shares as substitutes because they chose (and paid a fee) to transfer their Vivendi securities from New York to Paris. There was also a pronounced difference in the monthly turnover rate in Vivendi ADSs, compared to ordinary shares, representing additional evidence that investors pursued different trading strategies and perceived each market to be distinct. (See id. ¶ 17.)

Third, daily trading records demonstrate that there was no single, worldwide market for Vivendi securities. In a fully-unified market, various metrics, such as volatility, trading volume and bid-ask spreads, are highest at the beginning and end of each trading session. (See id. ¶ 29.) In a segmented market, those metrics are highest at the beginning and end of each trading session on each market. (See id.) Professor Gompers's analysis reveals that common stock trading in Paris and ADS trading in New York shows non-

coherent peaks and drops. (See id. ¶¶ 30-32.) For example, while trading volume tends to be higher at the open of the Paris Bourse and the close of the NYSE, volume also increases at the open of the NYSE and the close of the Paris Bourse, both of which occur in the middle of the aggregate trading session. (See id. ¶ 30.) Other metrics exhibited similar patterns. (See id. ¶¶ 31-32.) Accordingly, there is no single market for Vivendi securities that opens at 3:00 am EST in Paris and closes at 4:00 pm EST in New York.

Finally, and most important, Professor Gompers's analysis of how information is imputed into the prices of Vivendi securities rebuts plaintiffs' claim that "[one worldwide] market for Vivendi securities promptly digested current information regarding Vivendi from all publicly available sources and reflected such information in Vivendi's stock price". (FACC ¶ 196.) Trading in Vivendi ADSs in New York overlaps, but is not coextensive with, trading in Vivendi shares in Paris. During non-overlapping trading, the events and public information having the most significant effect on the price of Vivendi securities were factored into the price of Vivendi common stock on the Paris Bourse. (See Gompers Decl. ¶¶ 19-25.) When both markets were open, incorporation of news into the price of Vivendi securities occurred first and primarily on the Paris Bourse (affecting the price of Vivendi ordinary shares), then later and secondarily on the NYSE (for ADSs). (See id. ¶¶ 41-44.) In addition, some of the price movement in ADSs that occurred during afternoon trading on the NYSE was an overreaction to broader forces in the U.S. equities markets and tended to be reversed by trading in ordinary shares in Paris the following day. (See id. ¶ 40.)

II. THIS COURT SHOULD NOT CERTIFY A CLASS THAT INCLUDES EUROPEAN PURCHASERS.

A. Lack of Claim Preclusion in Europe Compels Rejection of the Proposed Class.

1. The Law in This District.

Virtually all investors in Vivendi ordinary shares are citizens of France or other European nations. (See Bisiaux Decl. ¶¶ 2-7.) Indeed, plaintiffs' proposed representatives who purchased or acquired Vivendi common stock are French (Mr. Gerard and Mr. Morel) or Austrian (Capital Invest). Second Circuit precedent, however, compels exclusion of foreign plaintiffs from a class when it is a "near certainty" that, were the action dismissed, taken to judgment or settled, defendants would not be able to assert claim preclusion in those foreign countries. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975).

In Bersch, the putative class included "thousands of plaintiffs preponderantly citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa and South America". Id. at 977-78 (footnote omitted). Two separate questions were before the court on appeal: (1) whether there was subject matter jurisdiction over securities fraud claims of foreign investors; and (2) whether it was permissible to certify a proposed class that included both domestic and foreign investors. Id. at 996.

The court addressed the class certification issue independently of subject matter jurisdiction, holding that one of the most important considerations in certifying a proposed class that includes significant foreign membership is whether a judgment by a U.S. court concerning the class would be given preclusive effect abroad. "[W]hile an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce

it, the case stands differently when this is a near certainty." Id. Underlying the court's reasoning was the principle that a prevailing defendant is "entitled to a victory no less broad than a defeat would have been". Id. The Bersch court held:

> "Here the record contains uncontradicted affidavits that England, the Federal Republic of Germany, Switzerland, Italy, and France would not recognize a United States judgment in favor of the defendant as a bar to an action by their own citizens, even assuming that the citizens had in fact received notice that they would be bound unless they affirmatively opted out of the plaintiff class . . .". Id. at 996-97.

Thus, the court excluded foreign purchasers from the proposed class. Id. at 997.

Following Bersch, Judge Mukasey has, on several occasions, rejected proposed classes that included significant European membership. In CL-Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 459-60 (S.D.N.Y. 1989), the court considered securities fraud claims of a class comprised exclusively of British citizens and institutions who had purchased shares in a Delaware corporation on the London Stock Exchange. Defendants argued that "[b]ecause all the class members are British subjects and British law does not bar relitigation if defendants prevail in a class action lawsuit . . . the class action method is in fact inferior to joinder". Id. at 459. Defendants filed an affidavit by a British barrister, Sir John Godfray Le Quesne, Q.C., who had also filed an affidavit in Bersch, stating that a British court would not recognize a foreign judgment in a U.S. "opt-out" class action. Id. The court denied class certification. Id. at 460.

Next, in Ansari v. New York Univ., 179 F.R.D. 112, 116 (S.D.N.Y. 1998), the court rejected a proposed class of foreign dentists in a breach of contract suit against N.Y.U.

Citing its previous decision in CL-Alexanders, the Court observed that "[o]ne of the factors that must be considered in analyzing th[e] 'superiority' requirement [of Rule 23] is whether the judgment in the class action will have a res judicata effect in future litigation", specifically "whether the foreign courts will recognize the preclusive effect of an 'opt-out' class action of the sort contemplated by Rule 23(b)(3)". Id. at 116. Although neither side in Ansari submitted any affidavit or other evidence on this question, the court noted that "what limited caselaw there is on this issue suggests that at least six of the prospective class members are residents of countries that would not accord preclusive effect to [the] class action [plaintiff] proposes". Id. at 117. Plaintiff thus failed to demonstrate "superiority", and his motion for class certification was denied. See id.

Most recently, In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig., 228 F. Supp. 2d 348, 364 (S.D.N.Y. 2002), Judge Mukasey again voiced strong skepticism about certifying a class that included substantial European membership. In Assicurazioni, defendants sought dismissal of four of twelve combined actions because "any class-action judgment in the United States will not be given preclusive effect in European courts". Id. at 363 (emphasis added). "Defendants fear that even if they litigate and win a judgment in this forum, the unnamed members of the losing class could simply relitigate their claims in various European courts". Id. The court stated that "[t]o the extent [that] plaintiff classes in this action . . . may include foreign plaintiffs, defendants' concerns are well-founded". Id. at 364. It continued:

> "In two past cases, I have found that it would be unfair to certify a class with a significant European membership, in part because that class would not be precluded from litigating abroad in their home countries should they lose in this forum. See Ansari, 179 F.R.D. at 116-17; CL-Alexanders Laing & Cruickshank v. Goldfield, 127 F.R.D.

> 454, 459-60 (S.D.N.Y. 1989); see also Bersch, 519 F.2d at 996, n. 47 (noting the problem of notice in foreign languages in a multinational class action). I will give full consideration to the issue of enforceability should it arise in the future with respect to this consolidated action." Id.

This Bersch line of cases was most recently applied in In re Daimler Chrysler AG Sec. Litig., 216 F.R.D. 291 (D. Del. 2003). There, the court rejected a proposed class of domestic and foreign stock purchasers that was remarkably similar to that proposed here – i.e., persons who exchanged shares in Chrysler for shares in DaimlerChrysler AG and persons who purchased shares of DaimlerChrysler AG in the open market thereafter. See id. at 294. Defendants argued that the class method was not superior, partly because "there is a significant likelihood that foreign courts will not recognize and enforce a United States judgment, and therefore, Defendants may be subject to multiple and potentially inconsistent adjudications in foreign countries". Id. at 301. Citing Ansari and CL-Alexanders, Judge Farnan observed that "[c]ourts have recognized that class certification may be inappropriate where obstacles exist due to the inclusion of foreign class members". Id. Although plaintiffs sought to include in their class "a significant number of foreign investors", "[l]ead [p]laintiffs have not adequately responded to Defendants' concerns regarding the issues of class management and damages suffered by purchasers on foreign exchanges". Id. The court excluded foreign investors from the class. Id.

In their papers, plaintiffs ignore the cases discussed above, citing several others and assert that "[c]ourts routinely certify classes that include foreign investors who purchased their shares on a foreign exchange". (Pltf. Br. 18.) None of those cases, however, presented the same procedural and factual scenario as here. And none of those requires – nor could it – that this Court ignore Bersch and its progeny.

Three of the cases cited by plaintiffs – In re Nortel Networks Corp. Sec. Litig., No. 01 Civ. 1855(RMB), 2003 WL 22077464 (S.D.N.Y. Sept. 8, 2003); In re Gaming Lottery Sec. Litig., 58 F. Supp. 2d 62 (S.D.N.Y. 1999); and Krangel v. Golden Rule Res., Ltd., 194 F.R.D. 501 (E.D. Pa. 2000) – concern proposed classes comprised mainly of Canadian investors. Those cases turned on whether the court had subject matter jurisdiction over the claims of those investors – not whether a judgment would be recognized and enforced in Canada. See Gaming Lottery, 58 F. Supp. 2d at 64, 73; Nortel, 2003 WL 22077464, at *1, 6-7; Krangel, 194 F.R.D. at 502, 506.

The Canadian provinces of Quebec, Ontario, British Columbia, Saskatchewan, Newfoundland and Labrador, Manitoba and Alberta have each adopted a comprehensive class action regime that allows for opt-out classes.[5] As a result, and as demonstrated by Nortel, Gaming Lottery and Krangel, the issue of claim preclusion that is before the Court here typically does not arise in securities class actions involving a significant number of Canadian plaintiffs. See

[5] See Quebec: Code of Civil Procedure of Quebec, R.S.Q., ch. C-25, Book IX (effective as of January 1979), available at http://www.canlii.org/qc/laws/sta/c-25/20040802/whole.html; Ontario: Class Proceedings Act, R.S.O., ch. 6 (1992) (effective as of January 1993), available at http://www.canlii.org/on/laws/sta/1992c.6/20040802/whole.html; British Columbia: Class Proceedings Act, R.S.B.C., ch. 50 (1996 Can.) (effective as of August 1995), available at http://www.qp.gov.bc.ca/statreg/stat/C/96050_01.htm; Saskatchewan: Class Action Act, S.S., ch. C-12.01 (2001) (effective as of January 2002), available at http://www.canlii.org/sk/laws/sta/c-12.01/20040618/whole.html (last visited Aug. 14, 2004); Newfoundland: Class Actions Act, Nfld. R.S. ch. C-18.1 (2001 Can.) (effective as of April 2002), available at http://www.canlii.org/nl/laws/sta/c-18.1/20040706/whole.html (last visited Aug. 14, 2004); Manitoba: Class Proceedings Act, C.C.S.M. c. C130 (2002) (effective as of January 2003), available at http://www.canlii.org/mb/laws/sta/c-130/20040802/whole.html; Alberta: Class Proceedings Act, S.A. 2003, c. C-16.6 (2003) (received the royal assent on 16 May 2003, but is not yet proclaimed), available at http://www.canlii.org/ab/laws/sta/c-16.6/20040430/whole.html.

generally In re Royal Ahold N.V. Sec. & ERISA Litig., 219 F.R.D. 343, 353, n.9 (D. Md. 2003) (noting that because Ontario recognizes opt-out class actions, the selection of OPTrust as lead plaintiff in Nortel "[p]resumably . . . did not cause concerns about the res judicata effect of any judgment"). Indeed, in Bersch itself the court focused on European countries, not on Canadian law. 519 F.2d at 996. Nortel, Gaming Lottery and Krangel thus offer no guidance to the Court in ruling on plaintiffs' class certification motion.[6]

The two other cases cited by plaintiffs – Takeda v. Turbodyne Tech. Inc., 67 F. Supp. 2d 1129 (CD. Cal. 1999), and Jordan v. Global Natural Res., 102 F.R.D. 45 (S.D. Ohio 1984) – are inapposite. Neither the Takeda nor Jordan court was presented with the facts and the record here, demonstrating that any judgment would not be recognized or enforced in Europe. The issue before the court in Takeda was not class certification but rather selection of lead plaintiffs.

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[6] We note, however, that in an earlier securities fraud class action against Northern Telecom Ltd., Judge Cedarbaum excluded from the proposed class "foreign subjects or citizens who purchased securities in defendant outside the United States". In re N. Telecom Ltd. Sec. Litig., No. 93 Civ. 4384 (MGC) (S.D.N.Y. Feb. 24, 1995) (order on class certification), attached as Exh. 2 to the Zach Decl. There, plaintiffs sought to certify a class of "all persons and entities, similarly situated, who purchased the publicly traded securities, including call options, of Northern Telecom Ltd.", during roughly a six-month period in 1993. (See Plaintiffs' Memorandum of Law in Support of Class Certification, at 1, attached as Exh. 3 to the Zach Decl.) Northern Telcom securities were sold over the Toronto, Montreal, Vancouver, London and Tokyo stock exchanges. (See Defendants' Supplemental Memorandum in Opposition to Plaintiffs' Motion for Class Certification, at 5, attached as Exh. 4 to the Zach Decl.) Defendants successfully maintained that "plaintiffs have not – and indeed cannot – show that inclusion of these foreign plaintiffs in this class action is superior to other methods of adjudication because the inclusion of foreign plaintiffs raises significant issues of manageability and fairness regarding the appropriate form of notice and the applicability of res judicata". (See id. at 3-4 (emphasis in original); see also id. at 19 (citing CL-Alexanders).)

67 F. Supp. 2d at 1136. Accordingly, the court concluded that "[a] wide-ranging analysis under Rule 23 is not appropriate at this initial stage of the litigation and should be left to consideration on a motion for class certification". Id. (internal quotations omitted).

> "Concerns respecting the res judicata impact of any judgment in favor of defendants, which have been the focus of decisional discussion of the difficulties inherent in certifying transnational classes, are not an issue with respect to the selection of Lead Plaintiffs, since those persons will clearly be bound by the judgment of the court" Id. at 1139.

And although claim preclusion was at issue in Jordan, the court observed that "[u]nfortunately, we do not have the assistance of such [foreign law] affidavits", as did the court in Bersch. 102 F.R.D. at 52. Here, however, Vivendi has submitted numerous such affidavits.

Although not cited by plaintiffs, there are a few decisions in this district that have certified classes including foreign investors. First, in In re Lloyd's Am. Trust Fund Litig., No. 96 Civ. 1262 (RWS), 1998 WL 50211 (S.D.N.Y. Feb. 6, 1998), it appears that the court departed from the standard set forth in Bersch. 1998 WL 50211, at *5. There, the court certified a class, partly because it did not believe that "a judgment in the United States would have no value in a foreign court". Id. at *15.

> "This is an action against a trustee for breach of its fiduciary duty under New York State law, where the trust res is situated in New York, and the situs of all the alleged wrongful acts occurred in New York. Accordingly, a foreign court may look to the results achieved here for guidance, thereby

contributing to the superiority of the class action procedure." Id.[7]

That, however, is not the standard. As articulated by the Second Circuit in Bersch, the proper standard is whether it is a "near certainty" that a judgment by a U.S. court will not be given preclusive effect abroad. 519 F.2d at 996. Indeed, in the more recent decision in In re Assicurazioni, Judge Mukasey reiterated that it is the lack of preclusive effect overseas that is relevant to the class certification decision. (See Assicurazioni, F. Supp. 2d at 363-64.) It may be, of course, that the claim preclusion analysis in foreign countries would be affected if the New York court were exercising in rem or quasi in rem jurisdiction over property located in New York. But that is not the case here, where the Court is exercising in personam jurisdiction over securities claims. Under those circumstances, the French and other laws clearly establish that no "value" will be placed on any judgment, much less preclusive effect. (See infra pp. 14-17.)

In Cromer Fin. Ltd. v. Berger, 205 F.R.D. 113 (S.D.N.Y. 2001), the court did apply the Bersch "near certainty" standard stating that "[t]he res judicata effect of a class action judgment is a factor that must be considered in evaluating the superiority of the class action device". Id. at

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[7] The same "no value" standard was applied by the court in In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig., 209 F.R.D. 353, 360 (S.D.N.Y. 2002) ("Based on the affidavits before us, we cannot conclude that a Turkish court would give no weight to a judgment of this court") (emphasis in original). The result in Turkcell, however, appears unremarkable. There the proposed class included persons who purchased ADSs in a Turkish cellular phone company, on the NYSE. 209 F.R.D. at 355-56, 361. Nothing in Turkcell indicates that that class was comprised of foreign plaintiffs. As we note above, we do not contest that class action treatment may be the superior way of adjudicating the claims of North Americans who purchased or acquired Vivendi ADSs. We do, however, maintain that class action treatment is not a superior way of handling the claims of foreign investors who will not be bound in their home countries by this judgment.

134; see also id. at 113, 121. On the evidence before that court the Bersch standard was not met: "it [wa]s at most a 'possibility' that a defense verdict will have no *res judicata* effect abroad". Id. at 135. Here, however, the record is quite different from that in Cromer. (See infra pp. 14-17.)

Further, in both Cromer and Turkcell the courts were doubtful that the lack of preclusive effect abroad would allow for inconsistent adjudications. See Cromer, 205 F.R.D. at 135, n.32 (noting the events that would need to occur before "[defendant] would be prejudiced by an inability to assert the defense of res judicata successfully"); Turkcell, 209 F.R.D. at 361 ("There is no other litigation pending with claims similar to this action."). Here, by contrast, three shareholder actions are already underway in France against Vivendi and all the putative members of this class action are free to join one of those actions. Nothing precludes German, British and Austrian citizens from filing similar shareholder actions in their countries. (See infra pp. 14-17.)

2. Affidavits of European Legal Experts Demonstrate that a Judgment by the Court Will Not Be Given Preclusive Effect in France or Elsewhere.

We have submitted the declarations of six distinguished experts on French law. The qualifications and expertise of Vivendi's affiants are beyond challenge. All of those experts agree that it is a certainty that a French court will not give any weight to – and it will not enforce – a judgment or a settlement entered by this Court in this action.[8]

First, the Cour de Cassation, the highest court in France, has ruled that French citizens possess the fundamental right

[8] See Audit Decl. ¶¶ 35-47; Carcassonne Decl. ¶¶ 34-36; Cohen Decl. ¶¶ 17, 25; de La Pradelle Decl. ¶¶ 138-39 ; Renard-Payen Decl. ¶¶ 23-32; Terré Decl. ¶¶ 47-60.

to have their legal disputes resolved by a French court. A French citizen can forgo that right only by effecting a conscious and unequivocal waiver. Here, the mere fact that a French citizen did not opt out of the proposed class (even assuming adequate notice) will not be sufficient to establish conscious and unequivocal waiver.[9]

Second, a French court will conclude, as is beyond dispute, that this Court did not apply French law to plaintiffs' claims, one of the preconditions that must be met if a French court is to give preclusive effect to a foreign judgment against a French citizen. While that requirement allows for an exception if the law actually applied is shown to be substantially equivalent to that which is regarded as applicable under French conflict of law principles, that exception will not apply here, as discussed in three of the expert reports.[10]

Third, certain aspects of a Rule 23 opt-out class action are inconsistent with French procedural law and public policy. Under French law, no one may claim in court by proxy ("Nul ne plaide par procureur"). In addition, not all of the members of the putative class will be identified by name. That fact alone is fatal.[11] Further, under the principle of adversarial proceedings ("le principe du contradictoire"), every litigant has the right to appear and be heard during any proceedings that affect his or her rights. Here, however, not only will the unnamed class members not be called to appear but they will be represented by others without knowing it. Because neither the class representatives nor the plaintiffs' lawyers have been properly authorized, under French law, to represent all of the Vivendi shareholders residing in France

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[9] See Audit Decl. ¶¶ 14, 19, 23-24; Carcassonne Decl. ¶¶ 34-36; Cohen Decl. ¶¶ 17, 25; de La Pradelle Decl. ¶¶ 17-19, 22-24; Renard-Payen Decl. ¶¶ 13-22; Terré Decl. ¶¶ 19-26.

[10] See Audit Decl. ¶¶ 25-26; Cohen Decl. ¶¶ 18-21; Terré Decl. ¶¶ 27-31.

[11] See Audit Decl. ¶¶ 27-34; Cohen Decl. ¶ 25; de La Pradelle Decl. ¶¶ 41-42, 48-49, 50-52; Renard-Payen Decl. ¶¶ 15-22; Terré Decl. ¶¶ 38-39.

or elsewhere in Europe, both groups lack capacity or standing under French law.[12]

The French law experts also state that even if this Court were to take the extraordinary step of issuing an anti-suit injunction in an attempt to bar absent class members from suing Vivendi in France, a French court would not recognize or enforce such an injunction. Nor will a French court stay or transfer to the United States any proceeding initiated against Vivendi in France by shareholders.[13]

The results are the same under German, English and Austrian law. German shareholders would be permitted to sue Vivendi in Germany based on the same allegations that were raised in the FACC regardless of the outcome of the current litigation. German law emphasizes the right of a party to be heard by the judicial body and, as a result, service of process under the Hague Convention is required for each of the individual parties. A German court would certainly not enforce any judgment where notice has only been given pursuant to Rule 23(c)(2).[14] Similarly, a judgment here will not be given preclusive effect under English law unless all of the class members are within, or had voluntarily submitted

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[12] French law also requires an individual determination of damages, which will not be made in this action until after trial, if at all. (See Audit Decl. ¶¶ 31, 34.) Under French law, the determination of one's claim against another, without express authorization or participation, is akin to expropriation of property. Accordingly, if the claims against Vivendi are dismissed on the merits or if the class is awarded damages and the damages allocations to French class members do not fully satisfy those shareholders' claims a French court will conclude that this action was a deprivation or expropriation of property and must therefore be ignored. Finally, even if this action were to result in judgment on the merits in favor of the plaintiffs, including an award of damages, the "non-opting-out" shareholders in France (or elsewhere in Europe) could attack the judgment as contravening French public policy barring contingency fees.

[13] See Audit Decl. ¶¶ 35-37; de La Pradelle Decl. ¶¶ 73-81; Renard-Payen Decl. ¶¶ 25-27; Terré Decl. ¶¶ 48-51.

[14] See Wegen Decl. ¶¶ 7-19.

to, the in personam jurisdiction of this Court. The conditions required under English law to establish such jurisdiction over British shareholders cannot be met here.[15] In addition, Austrian law, which applies to one of the putative class representatives and some class members, would also permit Austrian shareholders to relitigate the same claims raised in the FACC.[16]

3. French Investors Are Free to Join Similar Actions That Are Now Pending Against Vivendi in France.

It is clear under French law that French shareholders can sue Vivendi in France. This is not merely a theoretical possibility, since in the past several months French shareholders have initiated three damages actions against Vivendi based on essentially the same facts and allegations that are at issue here.

As discussed in the declaration of Guy Carcassonne, important changes in French law in 2003 permitted the formation and administration of shareholders' protection associations and accredited investors' protection associations, which are permitted to sue corporations. In addition, French statutes of limitation are generally much more generous than their American counterparts. As a result, Vivendi is facing potential litigation exposure from associations for many years to come.[17]

In addition, Vivendi is currently defending three direct shareholder suits filed in the Paris Tribunal de Grande Instance (a trial court of "first instance") in France, including Pasturaud v. Vivendi Universal S.A., Société Richard Hugo v. Vivendi Universal S.A. and Courage v. Vivendi Universal

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[15] See Rabinowitz Decl. ¶¶ 23, 39, 44-48.
[16] See Herbst Decl. ¶¶ 33-42.
[17] See Carcassonne Decl. ¶¶ 24-27, 32-36; Cohen Decl. ¶¶ 49-50.

S.A.[18] The Pasturaud action, brought on behalf of individual shareholders, is remarkably similar to this action. It purports to include not only all of the foreign members of the class proposed here but also all persons who acquired Vivendi shares over a much longer period of time – January 1, 1999 to April 30, 2005. By logging on to a website (www.classaction.fr), established by the plaintiffs' attorney who filed the complaints, and inputting some basic information, an aggrieved acquirer of Vivendi shares can join the Pasturaud action. To date, nearly 100 named individuals, including French, Moroccan and Algerian citizens, have joined as plaintiffs. (See Bisiaux ¶ 11.)

If European investors are made part of the class, as plaintiffs seek, there is a very real threat of prolonged, parallel proceedings concerning many of the same facts and allegations, resulting in inconsistent rulings and perhaps inconsistent judgments. But what is far more important is that Vivendi would be subjected to multiple actions for double damages and will not receive the minimal – but essential – repose that class actions offer to defendants.

B. Manageability Concerns Compel Rejection of the Proposed Class.

The fact that European courts will as a matter of certainty refuse to recognize or enforce a judgment by this Court is by itself a sufficient basis for rejecting any class that includes European investors. When that fact is considered along with the existence of parallel litigation in Paris and with other problems and deficiencies inherent in the proposed class, no one could seriously contend that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy". Fed. R. Civ. P. 23(b)(3). It most certainly is not. It is inferior and unfair.

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[18] See Bisiaux Decl. ¶¶ 10-13; Carcassonne Decl. ¶¶ 29-30; Cohen Decl. ¶¶ 42, 48.

Although the holders of Vivendi ADSs principally reside in North America, the holders of its common stock are almost all European residents. (See Bisiaux Decl. ¶¶ 2-7.) Proper notice to a broad European class will simply not be possible. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-76 (1974) (Rule 23's notice requirement could not be waived even if notice would be prohibitively expensive and even if no absent class member so notified would have a large enough stake to justify separate litigation of his or her claim); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). As the Second Circuit noted in Bersch, "management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts, even when the class members are mostly in the United States and still more so when they are abroad." 519 F.2d at 996.

1. Publication Notice Alone Would be Insufficient.

Plaintiffs contend that "[r]ecord owners and other members of the Class and Subclasses may be identified from records maintained by Vivendi or its transfer agent and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in securities class actions". (FACC ¶ 41.) That is not correct.

Unlike companies whose common stock is traded on the NYSE, Vivendi does not keep, does not have access to and does not have the right to have access to information that would enable it to identify its shareholders. (See Bisiaux Decl. ¶ 9; Heiser Decl. ¶ 23.) Vivendi has no transfer agent who can be called upon to provide that information. Most of Vivendi's common stock is bearer stock and French law does not permit Vivendi to know the names and addresses of the individuals who own its bearer stock. (See Bisiaux Decl. ¶ 9; Heiser Decl. ¶¶ 12-13, 20.)

Consequently, plaintiffs could only provide individual notice to a small number of European class members who held registered shares and would have to rely on publication notice for the others. Such notice will be wholly insufficient. See Greenfield v. Villager Indus. Inc., 483 F.2d 824, 831-32 (3d Cir. 1973) (rejecting publication notice only as insufficient); see also Molski v. Gleich, 318 F.3d 937, 953 (9th Cir. 2003) ("Because no individualized efforts were undertaken, we hold that the notice provided to the class was inadequate and failed to comport with the requirements of due process."); In re U.S. Fin. Sec. Litig., 69 F.R.D. 24, 47 (S.D. Cal. 1975) (holding that publication notice was sufficient because plaintiffs knew the identities and could contact holders of at least 58 percent of the bearer bonds at issue).

2. Plaintiffs Cannot Provide Notice that Comports with the Requirements of Rule 23 and the Due Process Rights of Absent Class Members.

Because a decision by this Court would not be given preclusive effect in Europe, it will be impossible for plaintiffs to meet the mandatory content requirements in their notice. Rule 23(c)(2)(B) requires that notice describe the "nature of the action" and "the definition of the class certified" and states that "[t]he notice must concisely and clearly state in plain, easily understood language . . . the binding effect of a class judgment on class members under Rule 23(c)(3)" (emphasis added). However, a French court will not recognize the preclusive effect of a judgment of this Court on subsequent claims in France, and therefore it would be false for the notice to state, as due process requires, that a judgment in this case will preclude subsequent damage claims unless the shareholder opts out. It will not.

There is also the problem of how to translate American legal terminology into "easily understood" French, Dutch,

German, Italian and Spanish, to name just a few of the languages spoken by foreign investors in Vivendi. (See Bisiaux Decl. ¶¶ 2-7.) The Advisory Committee Notes to the 2003 amendments to the Federal Rules of Civil Procedure observe, "[i]t is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers". See Fed. R. Civ. P. 23 advisory committee's note; see generally Conte & Newberg, Newberg on Class Actions § 8:39 (2002) (noting the confusion class notice can also cause among those to whom it is directed); Debra Lyn Bassett, U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction, 72 Fordham L. Rev. 41 (2003) (discussing the many problems inherent in providing class notice to putative foreign members of the proposed class, who are unfamiliar with the American class action system). That basic difficulty is compounded where, as here, notice must be provided in a large number of foreign languages. See Bersch, 519 F.2d 996, n.47 (discussing problems of providing notice).

These concerns are, we believe, insurmountable.

III. THIS COURT SHOULD NOT CERTIFY A CLASS THAT INCLUDES PERSONS WHO HAVE NO DAMAGES, INCLUDING THOSE WHO MERELY SWAPPED VIVENDI, S.A. SECURITIES FOR VIVENDI UNIVERSAL, S.A. SECURITIES.

A properly certified class cannot include individuals that did not experience any economic loss. Plaintiffs' definition of the putative class is not limited to persons who were damaged but includes all persons who obtained Vivendi Universal securities during the putative class period. (See Pltf. Br. 3.) That includes those persons who obtained Vivendi Universal shares and ADSs in a one-to-one exchange of Vivendi, S.A. securities, as well as those persons who purchased and sold all of their Vivendi securities during the class period ("in and out" purchasers). That is not proper.

A. Alleged Misstatements Regarding Vivendi, S.A. Cannot Have Been Material to Pre-existing Vivendi Shareholders and ADS Holders.

The allegation in the FACC is that Vivendi, S.A. (as opposed to Vivendi Universal, S.A.) overstated its own financial statements prior to the merger that created Vivendi Universal. (FACC ¶¶ 2-16.) The alleged misstatement occurred on October 30, 2000, after the Vivendi, S.A. shareholders acquired their stock. Vivendi, S.A. shareholders and ADS holders cannot be part of any class because they cannot show that the alleged misstatement inflating the value of shares or ADSs that they already owned was material to them or caused them any economic damage.

Materiality is a required element of a private securities fraud action. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976). To sustain such claims, plaintiffs must allege that knowledge of the alleged misstatements or omissions would "have made a reasonable shareholder less likely to favor the objected-to transactions". Minzer v. Keegan, 218 F.3d 144, 149 (2d Cir. 2000). If a fully-informed shareholder "would not have been any less likely to vote for the . . . merger", then the statements were immaterial and the shareholder cannot be part of the class. Id. at 150. Here, plaintiffs allege that Vivendi, S.A. securities were overvalued prior to the merger, which is simply inadequate under Minzer.

The court in In re McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1248, 1259-62 (N.D. Cal. 2000), expressly relied on the Second Circuit's reasoning in Minzer when it dismissed Section 11 claims because the alleged misstatements were immaterial to shareholders who already owned over-valued shares. The plaintiffs in McKesson included shareholders of both HBOC and McKesson, which merged to form McKesson HBOC. Id. at 1252-53. Plaintiffs there claimed the registration statement and prospectus

misstated the financial condition of HBOC. In dismissing the claims of the HBOC shareholders, the court held that:

> "If the true facts were disclosed prior to the merger, the market. . . would have. . . discounted the shares to correct the previous inflation. At that point, HBOC shareholders could have sold their shares into a depressed market, or they could have approved the merger, which . . . would only be more favorable with each drop in HBOC's trading price. There is simply not a substantial likelihood that a reasonable investor would have difficulty deciding which course of action to take. The misstatements were therefore immaterial." Id. at 1261.

The court determined that allowing class plaintiffs who exchanged their over-valued HBOC shares to continue as plaintiffs would result in a lawsuit "premised in McKesson's failure to tell the HBOC shareholders that they were getting too good a deal in the merger". Id.[19]

The facts alleged here are essentially identical to those in McKesson. The only alleged misstatement in plaintiffs' complaint on which holders of Vivendi, S.A. securities could have relied was contained in the registration statement and prospectus issued by Vivendi, S.A. on October 30, 2000. (See FACC ¶¶ 54, 55.) Plaintiffs contend that certain of

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[19] Similarly, in Elfenbein v. Am. Fin. Corp., 487 F. Supp. 619, 621-22 (S.D.N.Y. 1980), shareholders of a corporation absorbed in a merger ("National") sued the absorbing corporation ("Financial") alleging among other things the failure to disclose a tax liability. Id. at 621-22. The court held that disclosure of that liability "would have substantially depreciated the value of National's shares and have been an inducement to the stockholder to elect to accept the terms of the merger which provided for an exchange of National shares for Financial's ...". Id. at 627; see also Bond Opportunity Fund v. Unilab Corp., No. 99 Civ. 11074, 2003 WL 21058251, at *9 (S.D.N.Y. May 9, 2003).

Vivendi, S.A.'s "historical financial statements and balance sheets" contained in that document were false and misleading and inflated the value of Vivendi, S.A. securities. (See id.) As the courts in McKesson and Elfenbein held, however, the facts as alleged by plaintiffs would have meant that Vivendi, S.A. shareholders held stock that was priced higher than it should have been and therefore that when they exchanged that inflated stock for shares of Vivendi Universal, they received more shares than they should have received if the "truth" had been known. See McKesson, 126 F. Supp. 2d at 1261; Elfenbein, 487 F. Supp. at 627. Thus, the inflation was at worst immaterial and at best beneficial to them.

B. Vivendi, S.A. Securities Holders and "In and Out" Purchasers Can Have No Damages.

Another way of considering why the putative class as defined by plaintiffs cannot be certified is that it purports to include individuals that have no damages. Under Dura Pharms., Inc. v. Broudo, 125 S. Ct. 1627, 1631-32 (2005), it is not enough that securities were inflated during the proposed class period; investors must be able to show that they were damaged as a result. In Dura the Supreme Court held that in order to sustain a private securities fraud action, a plaintiff must sufficiently allege economic damage. Id. at 1633-34; see also Lentell v. Merrill Lynch & Co., 396 F.3d 161, 172-73 (2d Cir. 2005). A complaint that alleges only that a plaintiff purchased shares at an inflated value is inadequate because, "at the moment the transaction takes place, the plaintiff has suffered no loss". Dura, 125 S. Ct. at 1631.

Plaintiffs' complaint alleges that Vivendi Universal securities were inflated in the same way as the Vivendi, S.A. securities that were already owned by shareholders. (See FACC ¶¶ 2-16.) Any exchange of allegedly over-valued Vivendi, S.A. securities for allegedly over-valued Vivendi Universal, S.A. securities could not have caused those

plaintiffs to suffer any economic loss. (Vivendi, S.A. shareholders and ADS holders actually would have improved their economic position in the merger by exchanging their allegedly inflated securities for Vivendi Universal, S.A. securities, the value of which would have increased as a result of the merger with Seagram and Canal Plus.) Based on the rule articulated in Dura, those investors could not have experienced any loss and cannot be part of any class.

Similarly, holders of Vivendi securities that purchased and sold their shares prior to a corrective disclosure, must be excluded from the class as well. When a plaintiff buys and sells the defendant's stock prior to a corrective disclosure, thereby selling "the shares . . . before the relevant truth begins to leak out, the misrepresentation will not have led to any loss". Dura, 125 S. Ct. at 1631.

IV. PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF SHOWING ADEQUACY AND TYPICALITY.

A. Plaintiffs' Class Certification Papers Fail to Demonstrate Typicality and Adequacy.

The prerequisites to a class action under Rule 23(a) cannot be presumed; the party seeking class certification bears the burden of establishing every requirement. See Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157-59 (1982); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999); see also Sheehan v. Purolator, Inc., 839 F.2d 99, 103 (2d Cir. 1988); Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 597-98 (2d Cir. 1986). Proposed class representatives must do more than parrot back to the Court the Rule 23(a) requirements and then baldly assert that they satisfy those requirements. "Mere repetition of the language of Rule 23(a) is not sufficient. There must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled." In re Am. Med. Sys., Inc., 75 F.3d

1069, 1079 (6th Cir. 1996) (quoting Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974) (citation omitted) (emphasis added)).

In In re American Med., for example, the court found class certification inappropriate where "plaintiffs' complaint and class certification motion simply allege[d] the elements of Rule 23(a) in conclusory terms". 75 F.3d at 1083. Similarly, in Locaro v. Chicago Commodity Corp., Civ. A. No. 89-1206, 1990 WL 74250 (E.D. Pa. May 31, 1990), the court denied class certification, stating "[t]here is nothing, other than conclusory statements, both in the c[o]mplaint and in the motion for class certification from which the Court can determine whether [the Rule 23(a) requirements are met]". Id. at *1.[20]

We have already shown that plaintiffs utterly failed to support their assertion of a single worldwide market for Vivendi stock or in any way to address issues of enforceability of a judgment outside the United States. They have also failed to deal with the adequacy and typicality prongs of Rule 23(a). Plaintiffs merely describe the Rule 23(a) requirements and then assert that they are satisfied. Thus, after citing various cases, the sum total of plaintiffs' showing on typicality is as follows:

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[20] Similarly, in West v. First Pa. Bank, Civ. A. No. 89-4730, 1991 WL 17807 (E.D. Pa. Feb. 12, 1991), the court explained that plaintiff's "memorandum of law in support of her motion [for class certification], in which she repeats the language of Rule 23 ... but provides no additional factual basis for her class claims" did not satisfy "her burden of establishing as a threshold matter" the Rule 23(a) requirements. Id. at *2 (emphasis added). The court in First Pa. was "unable to subject [plaintiff's] motion for class certification to the 'rigorous analysis' required under Falcon", given "the conclusory nature of plaintiff's submission". Id. at *3. In fact, the court in First Pa. did not even consider the substantive objections to class certification raised by defendant because plaintiff's memorandum of law in support of her motion was simply insufficient on its face. Id.

> "The proposed class representatives' claims in this case are clearly typical of the claims of the Class because they arise out of the same uniform pattern of conduct – i.e., defendants' failure to disclose that Vivendi's operations and financial condition were dramatically weaker than what their public statements portrayed. Thus, the proposed class representatives stand in precisely the same position as do other investors who acquired Vivendi stock and ADSs during the Class Period. Moreover, the proposed class representatives and each of the Class members claim that, as a result of defendants' actions, they have been financially injured."

(Pltf. Br. 11.) Those conclusory statements cannot be enough. Indeed, they are so generic that they could easily be – and in fact are – included by counsel in the class certification papers filed in countless cases of alleged securities fraud – making a mockery of the entire inquiry.

With respect to adequacy, plaintiffs state:

> "the proposed class representatives' interests are co-extensive and do not conflict with class members' interests, and are typical of the claims of the other members. Plaintiffs and all class members have suffered losses due to their purchase of Vivendi securities. They have been injured by the same wrongful course of conduct of the defendants, and it is in the proposed class representatives' interests to vigorously prosecute this action on behalf of the Class." (Id. at 12.)

Again, those generic statements cannot be enough to satisfy the adequacy requirement, which implicates the due process rights of all class members. See Berger v. Compaq Computer Corp., 257 F.3d 475, 480 (5th Cir. 2001).

Plaintiffs provide no factual basis for their conclusory assertions. There is not a single factual statement relating to any of the specific individuals or entities that is put forward as a proposed class representative. The Court need not and should not go any further. See First Pa., 1991 WL 17807, at *2-3.

Plaintiffs claim that their election not to "add[] detailed discussion of the background and qualifications of each proposed class representative" in their opening brief is "consistent with customary practice and their understanding of the Court's June 1, 2005 Order". (Pltf. Br. 1 n.l.)[21] While it may indeed be the "customary practice" of the plaintiffs' bar to submit a short, boilerplate opening brief on class certification, the cases cited above make plain that such a practice is improper. The June 1, 2005 Order could not possibly be understood to endorse plaintiffs' approach. The only paragraph of the Order to address class certification briefing states: "Defendants shall serve their opposition to the pending motion for class certification no later than September 15, 2005. Plaintiffs shall serve their reply no later than September 30, 2005." (See 6/1/05 Order at ¶ 6.) In fact, Magistrate Judge Pitman already expressed concerns about plaintiffs' approach:

> MR. KERR: "I think our point on this issue is that the defendants are essentially asking us to highlight what we think is really going to end up

[21] See also 5/24/05 Hearing Tr. 9:1-5 ("MR. FREDERICKS: That is correct, although, as is fairly customary in cases of this type, the motions for class certification tend to be – the initial moving motions tend to be not terribly detailed, and then after class discovery is taken, the battle tends to be joined on opposition and reply"); id. at 16:25 - 17:1 ("MR. FREDERICKS: . . . . it is customary in securities cases that the motion for class certification tends to be a fairly plain vanilla type motion, because no discovery has yet been taken of the proposed class representatives, and the record on adequacy, typicality, commonality is invariably developed through discovery".)

being in a reply brief from the class cert motion . . . . (7/25/05 Hearing Tr. 83:20-24.)

. . . .

THE COURT: "Well, don't you bear the burden of proving all of the elements of the propriety of class certification?

MR. KERR: Yes, we do, Your Honor, but I think the approach that defendants seem to be advocating was rejected already by Judge Ho[l]well and the schedule that was adopted is that class discovery of the plaintiffs and document discovery would be completed. . . . ." (Id. at 84:22-85:6.)

Judge Holwell, of course, said no such thing.

B. Certain of the Proposed Class Representatives Are Inadequate.

1. European Residents.

Proposed class representatives Olivier Gerard, Gerard Morel and Capital Invest are inadequate.

a. Olivier Gerard.

Olivier Gerard is a resident of France. In December 2000, Mr. Gerard exchanged Vivendi, S.A. shares for Vivendi Universal shares.[22] Mr. Gerard did not acquire or purchase Vivendi securities at any other point during the proposed class period.

As demonstrated above in Section III, persons in Mr. Gerard's position cannot be a part of any class.

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[22] See Gerard Tr. 81:5 - 82:13; see also Gerard Second Corrected Certification, dated June 24, 2005, at Schedule A, attached as Exh. 7 to the Zach Decl.

Consequently, Mr. Gerard cannot participate in this action as a class representative, or in any other capacity.[23]

b. Gerard Morel.

Gerard Morel is also a resident of France. Mr. Morel exchanged Vivendi, S.A. shares and Canal Plus shares for Vivendi Universal, S.A. shares, following the December 2000 merger.[24] In addition, Mr. Morel states that he bought and sold Vivendi common stock on the Paris Bourse during the proposed class period. See id. Mr. Morel's last transaction in Vivendi common stock occurred on January 11, 2002, and therefore he only has standing to represent a class that includes Europeans who purchased Vivendi securities on a European exchange up to that date.[25]

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[23] In addition, Mr. Gerard has demonstrated that he is incapable of performing the fiduciary responsibilities of a class representative. Mr. Gerard admits to destroying relevant documents, after this action was initiated simply because he believed his attorneys had what information they needed. (See Gerard Tr. 28:19-29:16, 30:21-31:2, 41:11-22.) Magistrate Judge Pitman then ordered Mr. Gerard to determine whether the information destroyed was available from another source. (See 7/26/05 Pitman Order ¶ 7.) However, the information contained in the documents destroyed by Mr. Gerard has not been found in another source, and has not been provided to Vivendi.

[24] See Declaration of Gerard Morel in Support of Motion to Intervene, dated February 19, 2005, at Schedule A, attached as Exh. 8 to the Zach Decl.

[25] Mr. Morel has given inconsistent answers so frequently that it is not even clear how many Vivendi Universal shares he acquired or how and when those shares were purchased. Declaration of Gerard Morel in Support of Motion to Intervene, attached as Exh. 8 to the Zach Decl., conflicts with his interrogatory responses. (See Responses and Objections of Gerard Morel to Defendant Vivendi Universal, S.A.'s Requests for the Production of Documents and Interrogatories, Interrog. No. 3 at p. 21, attached as Exh. 9 to the Zach Decl.) The information contained in Mr. Morel's declaration and interrogatory responses both also conflict with Mr. Morel's own document production. (See Morel Dep. Exh. 38 at MOREL 00017, attached as Exh. 10 to the Zach Decl.; see also Morel Tr. 110:8-112:3, 117:5-118:6, 119:10-23.) Mr. Morel's inconsistent

The class period cannot extend beyond the date on which the last class representative made his or her final purchase of the securities at issue, see Levine v. NL Indus., Inc., 720 F. Supp. 305, 308 (S.D.N.Y. 1989), aff'd, 926 F.2d 199 (2d Cir. 1991), because a class representative "has standing to complain only of those alleged misstatements or omissions occurring prior to . . . the date on which [he] purchased [his] shares". Fischer v. Tynan, No. 90 Civ. 7587, 1993 WL 213025, at *2 (S.D.N.Y. June 16, 1993) (citing Denny v. Barber, 576 F.2d 465 (2d Cir. 1991)). At least one class representative must have relied (either directly or indirectly) on each of the misstatements alleged as false and misleading in order for the class to have standing to pursue claims arising out of those misstatements. Consequently, "[a]llegedly false statements made after the ... last stock purchase [of any class representative] are not actionable" because none of the class representatives has standing to bring such claims. See Zucker v. Sasaki, 963 F. Supp. 301, 306 (S.D.N.Y. 1997).[26]

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testimony on this basic issue will "become the focus of cross-examination and unique defenses at trial, to the detriment of the class". See Darvin v. Int'l Harvester Co., 610 F. Supp. 255, 257 (S.D.N.Y 1985).

[26] We are aware that two cases in this district appear to allow plaintiffs to bring securities fraud claims based in part on material misstatements made after their stock purchase. See Robbins v. Moore Med. Corp., 788 F. Supp. 179, 187-88 (S.D.N.Y. 1992); Nicholas v. Poughkeepsie Sav. Bank, No. 90 Civ. 1607, 1990 WL 145154, at *5 (S.D.N.Y. Sept. 27, 1990). However, as the court more recently observed in Zucker:

> "[T]he court in Robbins did not discuss Levine, which was affirmed by the Second Circuit 'for the reasons stated by the district court.' Levine v. NL Indus., Inc., 926 F.2d 199, 204 (2d Cir. 1991). In any event, this Court finds more persuasive the reasoning underlying Levine and other cases which have dismissed claims of misrepresentations made after plaintiff[']s stock purchase. See Gross v. Summa Four, Inc., 93 F.3d 987, 993 (1st Cir. 1996); Schwartz v. Novo Industri A/S, 658 F. Supp. 795, 799-800 (S.D.N.Y. 1987). It is impossible to establish reliance, an essential element of actions pursuant to

Because there are no other adequate proposed class representatives who purchased Vivendi common stock on the Paris Bourse after January 11, 2002, the period of a class consisting of French shareholders, even if certified, could not extend beyond that date.

c. Capital Invest.

Capital Invest, the fund management company of the Bank Austria Creditanstalt Gruppe GmbH, seeks to represent the claims of the Apk EU Big Caps fund, which it manages.[27] Apk, a pension fund for Austrian government workers, is the sole shareholder of the Apk EU Big Caps fund. [28] The Apk EU Big Caps fund obtained Vivendi Universal shares in exchange for previously-held shares of Vivendi, S.A., and it also purchased and sold Vivendi Universal shares on foreign exchanges – the last purchase of which occurred on January 21, 2002. [29]

"[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation". Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990). The unique defense raised against a class representative ultimately need not be successful; rather, the inquiry is whether the defense is likely to become a focus of the litigation to the detriment of the

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Section 10(b) and Rule 10b-5, on statements which were issued after the purchase of stock." 963 F. Supp. at 307, n.6

See also Roots P'ship v. Land's End, Inc., 965 F.2d 1411, 1420 (7th Cir. 1992); Gross v. Summar Four, Inc., 93 F.3d 987, 993 (1st Cir. 1996) (superceded by statute on other grounds).

[27] See Declaration of Irene Reisenberger, dated August 30, 2005, attached as Exh. 12 to the Zach Decl.

[28] See Reisenberger Tr.17:7-23:8; Kellner Tr. 29:8-10.

[29] See Reisenberger Dep. Exh. 2, 3; Reisenberger Decl., at ¶ 2, attached as Exhs. 15, 16, 12, respectively, to the Zach Decl.

class as a whole. See Landry v. Price Waterhouse Chartered Accountants, 123 F.R.D. 474, 476 (S.D.N.Y. 1989). Capital Invest does not have standing; as a result, it is subject to unique defenses that render it an atypical class representative.

A court may not presume that a litigant has standing – but rather must affirmatively assure itself that each of the parties is properly before the court. See Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001). A party may have standing to sue for a securities law violation only if the party is the "purchaser" of the securities at issue. See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754-57 (1975). The district courts that have considered the issue of standing have held that a fund manager could be considered a "purchaser" under the federal securities laws only if it first demonstrated that it was "the attorney in fact for [its] clients, and [had been] granted both unrestricted decision-making authority and the specific right to recover on behalf of [its] clients". In re Espeed, Inc., Sec. Litig., No. 05 Civ 2091(SAS), 2005 WL 1653933, at *1 (S.D.N.Y. July 13, 2005); see also Smith v. Suprema Specialties, Inc., 206 F. Supp. 2d 627, 634- 35 (D.N.J. 2002). The fund manager bears the burden of establishing that it has unlimited authority. See Espeed, 2005 WL 1653933, at *1. That burden cannot be met with bare assertions. See Smith, 206 F. Supp. 2d at 634-35.

Courts review investment agreements when determining whether fund managers have standing. See, e.g., In re Rent-Way Sec. Litig., 218 F.R.D. 101, 106-07 (W.D. Pa. 2003) (reviewing in detail multiple copies of the relevant investment agreements). Here, the testimony is that there is a written investment agreement between Apk and Capital Invest but Capital Invest has not produced that agreement.[30] As a result, Capital Invest cannot demonstrate that Apk, the sole shareholder of the Apk EU Big Caps fund, granted

[30] See Reisenberger Tr.17:7-23:8; Kellner Tr. 21:6-19; 22:9-23:12.

Capital Invest "unrestricted decision-making authority". See Espeed, 2005 WL 1653933, at *1. Capital Invest does not have standing and cannot be a class representative.

Rather, the documents Capital Invest has produced demonstrate that its authority was limited by various fund rules and regulations. (See Herbst Decl. ¶¶ 16-26.) For example, Apk decided whether hedging of fund assets was permissible and how such hedging would be accomplished.[31] In addition, the fund's sales prospectus includes special provisions that were drafted "together with the customer in the context of the investment committee," and restricted Capital Invest's activities (see Kellner Tr. 52:3-25):

> "Q: Okay. Are there specific restrictions contained herein on page CI 40 and onward in Exhibit 46 on the types of investment you can make for the funds?
>
> A. Only in terms of tradability of the stock there are restrictions.
>
> Q. Right. So there are restrictions?
>
> A. Yes.
>
> . . .
>
> Q. Do you follow these regulations, did you follow the regulations at the relevant time in making investments in the Big Caps Fund?
>
> A. Yes."[32] (Id. at 52:18-25; 50:20-23.)

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[31] See Kellner Dep. Exhs. 55, 56, 66, attached as Exhs. 17, 18, 19, respectively, to the Zach Decl.

[32] In particular, the fund regulations, among other things, restricted Capital Invest as to: (1) the amount and nature of the assets that could be

Rather, Capital Invest's practices with respect to the fund establish that it did not exercise unfettered decision making authority.[33] Capital Invest either took direction from Apk or sought consent from Apk before making various decisions with respect to the fund. For example, the indices against which the fund was benchmarked changed at various times but only after Capital Invest obtained approval or consent from Apk. Capital Invest would not have made changes to the index against which the fund was benchmarked without Apk's consent.[34]

Specifically, in 1998, Apk authorized changing the index from the EuroTop100 to Dow Jones Stoxx50. That change was not implemented until Apk expressly approved the change. (See Kellner Dep. Exhs. 57, 58, attached as Exhs. 24 and 25, respectively, to the Zach Decl.) As a result of that change, Mr. Kellner sold approximately 50 stocks, "more or less practically all stocks that were not part of the Stoxx50 index". (See Kellner Tr. 105:20-106:4.) Similarly, when the index again changed in 2001 – from the Dow Jones Stoxx50 index to the Dow Jones EuroStoxx50 index – Apk authorized that change. (See Kellner Dep. Exh. 61, attached as Exh. 26 to the Zach Decl.; Reisenberger Tr. 27:4-29:3; Kellner Tr. 117:2-118:7 ("I would call it the consent of the client that we can now switch to this other benchmark.").) Significantly, those changes required increasing the fund's holding in Vivendi securities – from "approximately 2 percent to 3 and

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held by the fund as bank deposits; (2) the circumstances under which the fund could invest in futures; and 3) the percentage of the fund's assets that must be invested in Euro-denominated assets or as a Euro hedge. See Reisenberger Dep. Exh. 46, Kellner Dep. Exh. 54, attached as Exhs. 20, 21, respectively, to the Zach Decl.; Kellner Tr. 69:14-71:19; 82:20-84:11; 62:14-64:8.

[33] See, e.g., Kellner Dep. Exh. 52, attached as Exh. 22 to the Zach Decl.; see also Herbst Decl. ¶¶ 16-26.

[34] See Reisenberger Tr. 28:14-29:3; see also Kellner Dep. Exh. 60, attached as Exh. 23 to the Zach Decl.

a half percent" – to reflect the change in the index. (See id. at 120:23-121:21.)[35]

The evidence, as discussed above, describes a relationship in which Capital Invest exercised virtually no independent decision making authority with respect to the most significant decisions involving the fund and instead acted at the direction of Apk. Accordingly, Capital Invest does not have standing to sue.[36]

2. U.S. Residents.

As discussed above, Vivendi does not contest that subclasses comprised only of North American purchasers of Vivendi ADSs and/or common stock may be appropriate here. However, neither Mr. William Cavanagh nor RSMB meets the criteria to represent any such class. In addition,

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[35] Further, Capital Invest intended to "have the performance of [the] portfolio parallel the performance of the index" and typically did not deviate more than one percent from the weighting of the underlying securities in the index – none of which substantiates plaintiffs' assertion that Capital Invest acted with unfettered decision-making authority. (See Kellner Tr. 164-165:4; 166:4-10; see also Reisenberger Tr. 28:14-29:18; Kellner Dep. Exhs. 59, 62, 64, attached as Exhs. 27, 28, 29, respectively, to the Zach Decl.)

[36] During earlier motion practice, Capital Invest referred to the declaration of a Capital Invest employee and a handful of other documents drafted and issued by Capital Invest to seek to establish standing. Those documents, however, fall far short of meeting its burden. The declaration of Ms. Reisenberger is self-serving and unreliable. In the declaration, which was written and signed in English, Ms. Reisenberger claimed that Capital Invest was the "attorney in fact" for the Apk EU Big Caps fund. At her deposition, however, she acknowledged that the term had no meaning to her (see Reisenberger Tr. 26:6-8) – testimony she later attempted to change after discussions with her attorney. See id. at 195:23-197:2. Such conclusory testimony cannot establish standing. See Smith, 206 F. Supp. 2d at 634-35. In addition, Capital Invest's attempts to point to Austrian law – such as the Austrian Investment Fund Act – to establish standing are not correct. (See Herbst Decl. ¶¶ 8-15, 27-32.) Apk has clearly reserved the ultimate decision making power to itself.

there are unique considerations with respect to Mr. Bruce Doniger that may prevent him from being an adequate class representative as well.

a. William Cavanagh.

Mr. Cavanagh is a resident of the U.S. His only transaction in Vivendi securities was the purchase of 100 Vivendi Universal ADSs on the NYSE on June 13, 2002.[37]

Mr. Cavanagh's lack of knowledge about his claim is striking. During an eight-hour deposition, Mr. Cavanagh was unable to answer most of the questions asked of him, responding "I don't recall", "I don't know" or "I'm not sure" a total of 368 times. That Mr. Cavanagh was forced to acknowledge "confusion or lack of knowledge frequently in his deposition" is sufficient grounds for rejecting him as a class representative. See Koenig v. E.M. Benson, 117 F.R.D. 330, 337 (E.D.N.Y. 1987). But in addition to Mr. Cavanagh's general lack of knowledge, there are also specific facts that he either did not know or understand that render him an inadequate class representative.

First, Mr. Cavanagh has almost no knowledge of this suit. At his deposition, he did not recall whether he had even reviewed the complaint more than a month before his deposition, did not know the year when it was filed and could not articulate key elements of plaintiffs' claims. (See Cavanagh Tr. 148:18-149:5, 300:20-301:19.) He was entirely unable to identify the proposed class period and did not know whether it began or ended in 2002. (See id. at 146:17-147:16.) He also could not name the other proposed class representatives or lead plaintiffs. (See id. at 97:18-100:3,

[37] See Cavanagh Dep. Exh. 47, at CAV00001-2; Responses and Objections of William Cavanagh to Defendant Vivendi Universal, S.A.'s Requests for the Production of Documents and Interrogatories, Interrog. Response No. 3, at 21, attached as Exhs. 30, 31, respectively, to the Zach Decl.

101:10-23.) Mr. Cavanagh could not even remember when or why he decided to seek to become a proposed class representative:

"Q: When did you personally decide that you wanted to seek to be appointed a proposed class representative? . . .

A: Yeah, I won't answer that.

Q: You won't answer . . . ?

A: It was – it was in consultation with my attorneys.

Q: When did it occur?

A: I don't have an exact date for you.

Q: Did it occur within the last six months?

A: I don't have an exact date.

Q: Did it occur within the last year?

A: I don't know.

Q: In the last two years?

A: I don't know." (Id. at 281:12-282:10.)

Second, Mr. Cavanagh was unable to testify regarding his transactions in Vivendi securities. Although he testified that he sold 100 Vivendi Universal shares, and that those were the only Vivendi Universal shares that he acquired during the proposed class period, he did not know when or the price at which he sold those shares. (See id. at 259:23-260:11.) Mr. Cavanagh could not even say whether he sold those shares before the end of the proposed class period:

"Q: The 100 Vivendi securities that we talked about that you purchased in June of 2002, did you sell them?

A: Yes.

Q: When did you sell them?

A: I don't know the exact date.

Q: Do you know the month?

A: No.

Q: Did you sell them prior to September 2002?

A: I don't know." (Id. at 181:14-182:3.)

Finally, Mr. Cavanagh has not monitored class counsel. His deposition testimony makes clear that he is either unwilling or unable to "check the otherwise unfettered discretion of counsel" – a primary responsibility of class representatives. Weisman v. Darneille, 78 F.R.D. 669, 671 (S.D.N.Y. 1978). Mr. Cavanagh does not recall whether he has ever met or spoken with any attorney associated with the Milberg Weiss law firm and will work in conjunction only with attorneys from the law firms of Murray Frank and Abbey Gardy. (See Cavanagh Tr. 15:25-16:19, 278:25-280:2.) The court in Weisman denied class certification where the proposed class representative had not met with his counsel regularly, was uncertain whether he had seen a copy of the complaint and failed to comprehend any of the duties and responsibilities of a class representative. 78 F.R.D. at 671. Mr. Cavanagh is no different and must therefore be rejected as a class representative.

b. RSMB.

RSMB administers the pension fund of the retirement system for the general employees of Miami Beach. As part of Vivendi's December 2000 merger, RSMB acquired Vivendi Universal ADSs in exchange for Vivendi, S.A. and Canal Plus ADSs.[38] RSMB did not acquire any Vivendi Universal securities thereafter during the proposed class period. As a result, even if RSMB were found to be an adequate class representative, it could only represent North American residents who acquired Vivendi Universal ADSs as part of the merger and who raise 10(b)(5) claims. RSMB does not have standing to bring claims on alleged misstatements issued after the exchange of shares pursuant to the merger and there are no other class representatives who can represent such claimants. See, e.g., Zucker, 963 F. Supp. at 306; Levine, 720 F. Supp. at 308.

The principal evidence available to determine whether RSMB is an adequate class representative is the deposition of Mr. Rick Rivera, the individual RSMB designated as most knowledgeable to testify about the class representative topics contained in defendants' Rule 30(b)(6) deposition notice. Mr. Rivera's testimony demonstrates, however, that RSMB has no understanding of important aspects of this action or the responsibilities attendant to being a class representative. Mr. Rivera responded "I don't know", "I don't recall", "I don't remember" or "I'm not sure" a combined total of 365 times during his seven-hour deposition. Mr. Rivera could not:

- describe the scope of the proposed class (see Rivera Tr. 107:15-108:7);

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[38] See Memorandum in Support of Motion by City of Miami Beach General Employees Retirement System to Supplement the Record with Respect to Lead Plaintiff Application, at 3, attached as Exh. 33 to the Zach Decl.

- identify any document relevant to this action that RSMB has reviewed or state with certainty that RSMB had ever reviewed the complaint (nor did he understand what the term "complaint" means, in general terms) (see id. at 27:7-20, 58:2-4);

- state with certainty that RSMB read its responses to defendants' interrogatories, although he personally verified those responses (see id. at 73:8-25);

- identify how many times RSMB has spoken with plaintiffs' counsel or even whether RSMB had done so at all in the last year (see id. at 57:3-25);

- identify the number of Vivendi Universal shares RSMB acquired during the proposed class period or when such shares were purchased or sold (see id. at 85:14 - 86:9);

- state with certainty whether RSMB had disposed of all of its Vivendi securities "[d]uring the putative class period" (see id. at 185:16 - 186:2); or

- describe what the interests of class members were or how RSMB would determine those interests, although he testified that as a class representative he "would look for the best interests of the class members" (see id. at 123:16-124:10).

"An essential element of adequacy of representation is that the class representative be sufficiently familiar with the case as to exercise independent control over the attorney." Scott v. New York City Dist. Council of Carpenters Pension Plan, 224 F.R.D. 353, 355 (S.D.N.Y. 2004). That standard has not been met where the class representatives have "so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the

attorneys". Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1077-78 (2d Cir. 1995) (internal quotations omitted). For example, the court in Scott rejected one of the two class representatives because the individual had "an alarming lack of familiarity with the suit" and "little or nonexistent knowledge of their role as class representatives". Scott, 224 F.R.D. at 356. Specifically, at his deposition, this individual "stated he did not know what allegations were contained in the complaint . . . had not seen the complaint prior to his deposition . . . did not know for sure whether this was a class action suit . . . did [not] know what a class representative was . . . [and] had personally met with counsel only once in the three years prior to his deposition". Id. Similarly, the court in Levine v. Berg, 79 F.R.D. 95, 97 (S.D.N.Y. 1978), rejected a proposed class, in part because the proposed class representative "testified that although she glanced briefly through the complaint before it was filed, she did not consider it thoroughly until the day prior to her deposition . . . [and] was unable to articulate, with any quantum of comprehension, the wrong purportedly practiced upon her and the proposed class". The proposed class representative's testimony also "reveals an alarming adversity to unearthing the facts relevant to her claim, as well as a total reliance on her counsel, to whom she gave . . . the case and . . . figured whatever he had to do, he did". Id. at 98.

So too here RSMB stands in no different position than the proposed class representatives in Scott, Levine and other cases. See, e.g., Darvin, 610 F. Supp. 255; Greenspan v. Brassler, 78 F.R.D. 130, 134 (S.D.N.Y. 1978).[39] It should be rejected as a class representative.

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[39] RSMB also is inadequate because it is unable to fulfill the discovery obligations of a class representative. On July 26, 2005, Magistrate Judge Pitman ordered RSMB to produce "filed documents and discovery materials in other actions" in which RSMB has been, or has sought to be, a representative of a class or putative class. (7/26/05 Pitman Order ¶ 5.) RSMB, however, has failed to comply with that court order. RSMB's

c. Bruce Doniger.

Bruce Doniger is a resident of the U.S. Mr. Doniger's only acquisition of Vivendi Universal ADSs were received in exchange for his previously held Seagram shares after the merger in December 2000. A review of the evidence suggests that Mr. Doniger may be an adequate representative of a class comprised of only North American residents who acquired Vivendi Universal ADSs as part of the merger and raise 10(b)(5) claims. He does not have standing to bring claims on alleged misstatements issued after he exchanged his shares. See, e.g., Zucker, 963 F. Supp. at 306; Levine, 720 F. Supp. at 308. There are no other adequate class representatives with standing to represent the post-December 2000 claims.

The Court should also be aware that Mr. Doniger is a second cousin to Edgar Bronfman, Sr. and Charles Bronfman – father and uncle respectively to Edgar Bronfman, Jr. – and sponsor of former Board member Samuel Minzberg.[40] Mr. Doniger received his Seagram shares because of his familial relationships. (See Doniger Tr. 20:3 - 23:10, 38:23 - 39:8, 101:11 - 102:11.) Those relationships are certain to be raised at trial if a class of ADS holders is certified. See Landry, 123 F.R.D. at 476.

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excuse is that it is incapable of obtaining documents from its attorneys in other cases. (See 9/20/05 Ltr. from B. Parr to O. Zach; 9/28/05 Ltr. from B. Parr to T. Sankoorikal, attached as Exhs. 35, 36, respectively, to the Zach Decl.)

[40] In the FACC plaintiffs allege that prior to December 2000 "the principal owners of Seagram were Edgar Bronfman, Jr. and the Bronfman family, which became the largest shareholders of Vivendi after the merger." (See FAC ¶¶ 51) Edgar Bronfman, Jr. held the position of Executive Vice Chairman of the Vivendi Board until December 2001 when he resigned. (See FAC ¶¶ 79.)

CONCLUSION

Vivendi respectfully requests that the Court deny Plaintiffs' Substituted Motion for Class Certification.

October 5, 2005.

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APPENDIX P

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR SUBSTITUTED MOTION FOR CLASS CERTIFICATION, FILED DECEMBER 21, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	Civil Act No. 02 Civ. 5571 (RJH/HBP)

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In re U.S. Fin. Sec. Litig.,
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CITATION CONVENTIONS

- "Parr Ex." for references to the Declaration of M. Elizabeth Parr in Further Support of Plaintiffs' Substituted Motion for Class Certification, dated December 21, 2005.

- "Complaint ¶" for references to plaintiffs' First Amended Consolidated Class Action Complaint, dated November 24, 2003, attached as Exhibit 11 to the Parr Declaration.

- "Vivendi" for references to Vivendi Universal, S.A.

- "Seagram" for references to The Seagram Company Ltd.

- "Canal Plus" for references to Canal Plus, S.A.

- "Miami Beach" for references to the Retirement System for the General Employees of the City of Miami Beach.

- "Capital Invest" for references to Capital Invest, Die Kapitalanlagegesellschaft Der Bank Austria Creditanstalt Gruppe GMBH.

- "Big Caps Fund" for references to the APK EU-Big Caps Fund.

- "APK" for references to APK Pensionskasse Aktiengesellschaft.

- "Gompers ¶" for references to the Declaration of Paul A. Gompers, dated October 3, 2005.

- "Nettesheim ¶" for references to the Declaration of Jane D. Nettesheim, dated December 19, 2005.

- "Bhagat ¶" for references to the Declaration of Sanjai Bhagat, dated December 14, 2005.

- "Mourre ¶" for references to the Declaration of Alexis Mourre, dated December 6, 2005.

- "Harris ¶" for references to the Declaration of Prof. Jonathan Harris, dated December 8, 2005.

- "Mankowski ¶" for references to the Declaration of Prof. Dr. Peter Mankowski, dated December 12, 2005.

- "Smit ¶" for references to the Declaration of Prof. Hans Smit, dated December 20, 2005.

- "Gaudemet-Tallon ¶" for references to the Declaration of Prof. Helene Gaudemet-Tallon, dated December 1, 2005.

- "Specht ¶" for references to the Declaration of Dr. Leopold Specht, dated December 16, 2005.

- "Hilsee ¶" for references to the Affidavit of Todd B. Hilsee, dated December 19, 2005.

- "Morel Dep." for references to the official transcript of the deposition of Gerard Morel, dated May 25, 2005, attached as Exhibit 16 to the Parr Declaration.

- "Gerard Dep." for references to the official transcript of the deposition of Olivier Marie-Guillaume Gerard, dated June 24, 2005, attached as Exhibit 18 to the Parr Declaration.

- "Rivera Dep." for references to the official transcript of the deposition of Rick Rivera, dated May 20, 2005, attached as Exhibit 19 to the Parr Declaration.

- "Cavanagh Dep." for references to the official transcript of the deposition of William Cavanagh, dated July 29, 2005, attached as Exhibit 24 to the Parr Declaration.

- "Doniger Dep." for references to the official transcript of the deposition of Bruce Doniger, dated May 17, 2005, attached as Exhibit 25 to the Parr Declaration.

- "Kellner Dep." for references to the official transcript of the deposition of Thomas Kellner, dated September 19, 2005, attached as Exhibit 27 to the Parr Declaration.

- "FMA" for references to the Austrian Financial Markets Authority.

- "Böhm & Ungerböck ¶" for references to the Declaration of Christian Böhm and Alfred Ungerböck in Support of Plaintiffs' Motion for Class Certification and Appointment of Capital Invest as a Class Representative.

- "July 25, 2005 Tr." for references to the transcript of the Oral Argument Before the Honorable Henry B. Pitman, United States Magistrate Judge, dated July 25, 2005, attached as Exhibit 15 to the Parr Declaration.

- "Apr. 22, 2005 Order" for references to the Order of Judge Richard J. Holwell, United States District Judge, dated April 22, 2005, attached as Exhibit 6 to the Parr Declaration.

- "Apr. 21, 2005 Tr." for references to the transcript of the Conference Before the Honorable Richard J. Holwell, United States District Judge, dated April 21, 2005, attached as Exhibit 5 to the Parr Declaration.

PRELIMINARY STATEMENT

Vivendi's primary argument is that a single global class of purchasers of Vivendi shares should not be certified, and that foreign purchasers who were defrauded in *precisely* the same manner as their US counterparts should be excluded altogether. Vivendi is wrong.

First, Vivendi tries to create an artificial division between those (whether US or foreign) who purchased Vivendi ADSs in New York and those who purchased Vivendi ordinary shares on European exchanges. According to Vivendi, notwithstanding 21st century communications and global financial markets, there was somehow no worldwide market for Vivendi stock, and that subclasses are required. Not surprisingly, Vivendi cannot point to a *single* case in which purported "insufficient market integration" has caused a court to hold that an ADS purchaser cannot represent an ordinary share purchaser, or vice-versa. Moreover, as plaintiffs' experts show, prices and returns for Vivendi ADSs (each of which represent one Vivendi ordinary share) were effectively the same as those for Vivendi ordinary shares that traded in Europe, and the global market for these securities was *highly* integrated.

Next, despite this Court's prior rulings that it has jurisdiction over claims of foreign purchasers, Vivendi asserts it would be "unfair" or "unmanageable" for the Court to exercise that jurisdiction on a class basis. However, as shown by plaintiffs' foreign law experts, Vivendi's res judicata arguments fail to meet the Second Circuit's "near certainty" test under *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), and are also not even particularly relevant in light of practical considerations that make Vivendi's "relitigation" scenarios most unlikely. Vivendi's purported "manageability" and "notice" concerns are also misplaced, and the pending "Canoy actions" in France (which are *not* "effectively a class action," as Vivendi falsely

asserts) are hardly "superior" to this proceeding. In sum, the leading recent cases from this District all support certification of a global class here, and a global class has just been stipulated to in another major securities fraud case, in *In re Royal Ahold N.V. Sec. Lit.*, No. 1:03-MD-01539 (D. Md.) (Parr Ex. 1), where the same arguments had been raised.

Third, Vivendi's effort to exclude investors from the class who allegedly suffered "no damages" is premature. Instead, as case law makes clear, the extent to which "in and out" purchasers (as well as investors who acquired new Vivendi shares as part of the triangular merger in 2000 between Vivendi, Seagram and Canal Plus) suffered damages should be resolved after merits discovery and completion of expert reports based on a full record, rather than at class certification. At most, the appropriate remedy at this stage is to clarify the definition of persons included in the proposed class by adding the words "and who were damaged thereby."

Finally, Vivendi's various attacks on the adequacy of each of the proposed class representatives are unfounded. This case has been litigated vigorously for over three years: motions to dismiss have been defeated, voluminous merits discovery is being actively pursued, *each* proposed class representative has responded to *multiple* interrogatories and document requests, and each has been deposed; indeed, plaintiff Morel and *two* employees of plaintiff Capital Invest have traveled from Europe to the US to be deposed. The proposed class representatives are all adequate, and have demonstrated their commitment to this action.

ARGUMENT

I. THE COURT SHOULD CERTIFY A SINGLE WORLDWIDE CLASS

Vivendi begins its attack on class certification by challenging plaintiffs' seemingly uncontroversial allegation that there was a single integrated worldwide market for the

publicly-traded equity securities of Vivendi. Given that Vivendi Universal is one of the largest companies in the world (with a market capitalization in the tens of billions), given that we live in a world of 21st century communications and global financial markets — and given that the two securities at issue are fundamentally ***the same*** (to wit, one Vivendi ADS represents precisely one Vivendi ordinary share) — the conclusion that the separate exchanges on which Vivendi shares traded constitute a single market would seem obvious. Indeed, plaintiffs are unaware of a case in which a class of ADS and ordinary share purchasers has had to be bifurcated into subclasses based on a finding of "insufficiently integrated" markets, nor does Vivendi cite any.

Nonetheless, Vivendi has turned to Prof. Gompers to concoct a "strawman" argument under which he defines market integration as involving two or more markets in which the securities trading in each market are "***perfect*** substitutes and exhibit returns with ***identical*** properties." Gompers ¶3 (emphasis added). However, as plaintiffs' financial expert (Jane D. Nettesheim) points out:

> Other researchers appear to consider two markets integrated when opportunities to make arbitrage profits by trading across markets are limited. Thus, markets may not be *perfectly* integrated in the strictest sense, but markets in developed countries are considered highly integrated in that opportunities for arbitrage profits are extremely limited and when they exist they disappear rapidly, i.e. prices align very quickly, usually within minutes. Furthermore, this is not a manual process [i.e., it is one that only the very largest and most sophisticated of investors can engage in]. The elimination of price discrepancies through arbitrage is what happens in integrated markets. Arbitrage opportunities vanish very quickly

> because modern investment banks (and similar institutions) with very sophisticated trading systems, e.g. utilizing "super" computers, are engaged in arbitraging away price discrepancies extremely rapidly between two developed markets. Nettesheim ¶12 (internal citations omitted).

Unsurprisingly, scholarly literature therefore supports the view that there is a single market for ADSs and shares of large companies (like Vivendi) that trade on multiple national exchanges:

> One obvious test of integration that Dr. Gompers apparently chose not to perform was simply to compare the prices of Vivendi ADSs, converted to Euros at the contemporaneous exchange rate, with the prices of the ordinary shares at the same time of each day during the Class Period. ***Researchers have found that the U.S. and major European markets are integrated in the sense that the prices are essentially the same in the two markets.*** Kim *et al.*, in an article cited and relied upon by Dr. Gompers, found that "ADRs and their corresponding foreign shares tend to have similar temporal properties. This is as expected because in a perfectly frictionless market they will be priced identically." ***Phylaktis and Korczak found that for a sample of stocks from U.K and French companies, prices in the home and U.S. markets were integrated.*** . . . *Lowengrub and Melvin using data on German firms listed in the U.S., found that "[t]he evidence is consistent with an integrated global trading environment rather than two segmented markets . . . ." Id.* ¶13 (internal citations omitted, emphasis added).

Moreover, Nettesheim's analysis of empirical prices and returns data specific to Vivendi similarly confines the

obvious: that there is a single, ***highly*** integrated market for Vivendi. For example, as Nettesheim Exhibits 4-8 show, differences in prices and returns for the ADSs and ordinary shares were *de minimis* (and one would never expect to have *identical* prices and returns since, among other things, prices are always changing, and will vary within bid/ask spreads depending on whether the last order was a buy or sell). *Id.* ¶¶14-16. In short:

> Because the prices of (and returns on) the ordinary shares and ADSs (converted to Euros) were almost always effectively equivalent, the data confirm that trading in ordinary shares on Euronext-Paris and trading the ADSs on the NYSE were integrated and that U.S. and European investors were similarly situated. This is not surprising, as each ADS is a claim on one ordinary share; thus each ADS has the same claim on the underlying value of Vivendi as each ordinary share.[1]

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[1] Plaintiffs' other expert, Prof. Sanjai Bhagat of the University of Colorado, similarly concludes there was no statistically significant difference between the prices and returns for the ADSs and the ordinary shares. Bhagat ¶¶7.1-7.5; *see also id.* ¶7.6 (lack of "statistically significant variances in returns confirms that differences in returns were *de minimis,* were not predictable . . . and would appear to warrant a presumption that the differences were sufficiently small that they could not be exploited to make excess or unusual economic profits"). His analysis is all the more significant because (like Gompers, but unlike Nettesheim) he did *not* use synchronous prices to calculate returns, but instead used closing prices on each exchange (which inherently leads to different prices and returns because New York closes 4½ hours after Paris does). *Id.* ¶7.2.2. Thus, as Bhagat and Nettesheim agree, Vivendi's expert (Gompers) is able to create an impression of meaningfully different returns *only* by looking at "intra-day" returns, which use non-synchronous prices to calculate returns over very short and non-comparable trading periods. *Id.* ¶¶7.2.2-7.3; Nettesheim ¶¶33-34.

Nettesheim ¶17.[2] Gompers' other arguments are also wrong or irrelevant:

- Contrary to Gompers, both US and European investors were subject to currency risks whether they held Vivendi ADSs or ordinary shares. *Id.* ¶¶9b,18-20;

- Gompers' "evidence" of market segmentation is based on minor differences in monthly trading volumes and "intra-day trading characteristics," and consists of observations of differences that did not appear to have meaningful effect on share prices or share price reactions to new important information — and one of Gompers' conclusions based on certain statistical tests is incorrect. *Id.* ¶¶9c, 9e, 21-23, 34-42;

- Time zone differences (noted by Gompers) do not mean that European and US investors had "different" trading opportunities. *Id.* ¶¶9d, 24-33;

- That news about Vivendi tended to come out first during the Paris-only or "over-lapping" NY/Paris trading hours is not significant, nor does Gompers show that the impact of important "new news" was not promptly incorporated in prices on both exchanges at the first opportunity (or that timing issues otherwise allowed investors on one exchange to make excess profits, or avoid excess losses, compared to investors on the other exchange). *Id.* ¶¶9a, 9f, 12-17, 39-42; and

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[2] There is also no reason to believe that the trading in Vivendi shares on other major European exchanges was not part of this ***highly integrated*** global market. Indeed, "[the London and Paris] markets are so integrated that investment firms are able to formally issue equity finance on their home exchanges [e.g., Paris], and the new securities become traded in London immediately." *Id.* ¶97 (citation omitted). A review of price charts for Vivendi shares on the London and Frankfurt exchanges also confirms that those prices tracked Paris prices very, very closely. Nettesheim Ex. 28.

- Gompers concludes that "markets" for Vivendi shares were not ***perfectly*** integrated, but does not (and cannot) deny that they were ***highly*** integrated. *Id.* ¶¶9g, 12-17, 43-44.

Because the major European and US markets for Vivendi were both ***highly*** integrated and efficient, and show virtually identical returns and pricing (except when "daily returns" using non-synchronous prices are used, à la Gompers), nothing in Gompers' report results in differences between those who purchased on the NYSE and those who purchased on European exchanges that would remotely warrant the creation of subclasses. *Moreover, Rule 23 plainly does not require that all class members' claims be "identical," and classes are routinely certified in securities cases that include purchasers of different types of securities that are much less similar than the all-but-identical ADS and ordinary shares at issue here.*[3] For certification purposes, the relevant inquiry is whether those who purchased in Europe (including US institutions who purchased in Europe) were so differently situated from those who purchased in the US that the ***fraud*** at issue actually ***affected*** the members of these "two groups" in a meaningfully different way. In this case, however, the evidence overwhelmingly supports the conclusion that ***all*** purchasers were affected in the ***same*** way by the ***same*** fraud.[4]

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[3] *E.g., In re WorldCom Inc. Sec. Litig.*, 219 F.R.D. 267, 280 (S.D.N.Y. 2003) (Cote, J.) (certifying single class of stock and bond purchasers because both groups "will necessarily seek to develop facts sufficient to prove the underlying accounting fraud at WorldCom"), *motion for pet. for leave to appeal under F.R.C.P. 23(f) denied in relevant part, Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82 (2d Cir. 2004); *In re Prudential Sec. Inc. Ltd P'ships Litig.*, 163 F.R.D. 200, 208 (S.D.N.Y. 1995) ("The typicality requirement of Rule 23(a)(3) does not require that named plaintiffs invest in all related partnerships that are the subject of the action.").

[4] Similarly, Vivendi argues that subclasses are needed for plaintiffs' 1933 and 1934 Act claims. However, because §10(b) claimants must

II. FOREIGN PURCHASERS SHOULD NOT BE EXCLUDED

Numerous courts have certified classes in federal securities cases that include non-US purchasers.[5] Nonetheless, Vivendi argues that foreign investors should be denied the benefits of the US class action because Second Circuit precedent "compels the exclusion of foreign

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necessarily also prove the elements of related 1933 Act claims that are based on a common course of conduct, courts routinely certify single classes asserting 1933 and 1934 Act claims. *See e.g., In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 454 (S.D.N.Y. 2004); *In re WorldCom*, 219 F.R.D. at 280; *In re Globalstar Sec. Litig.*, No. 01 Civ. 1748, 2004 U.S. Dist. LEXIS 24164 (S.D.N.Y. Dec. 1, 2004); *Cross v. 21st Century Holding Co.*, No. 00 Civ. 4333, 2004 U.S. Dist. LEXIS 2283 (S.D.N.Y. Feb. 11, 2004).

[5] *See, e.g., Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113 (S.D.N.Y. 2001) (Cote, J.), *motion for pet. for leave to appeal under F.R.C.P. 23(f) denied*, docket no. 02-8002 (2d Cir. Feb. 6, 2002) (certifying international class that included plaintiffs governed by Netherlands Antilles, English and Swiss law); *In re Nortel Networks*, No. 01 Civ. 1855, 2003 U.S. Dist. LEXIS 15702, at *22 (S.D.N.Y. Sept. 5, 2003) (Berman, J.) (certifying class of US and non-US purchasers), *motion for pet. for leave to appeal denied*, slip op., No. 03-8038 (2d Cir. Nov. 24, 2003) (Parr Ex. *2); In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig.*, 209 F.R.D. 353, 360-61 (S.D.N.Y. 2002) (Buchwald, J.) (same); *Krangel v. Golden Rule Res.*, 194 F.R.D. 501, 506 (E.D. Pa. 2000); *Frietsch v. Refco, Inc.*, No. 92 C 6844, 1994 U.S. Dist. LEXIS 312, at *32 (N.D. Ill. Jan. 12, 1994) (certifying class including European investors); *Jordan v. Global Natural Res., Inc., 102* F.R.D. 45 (S.D. Ohio 1984) (inclusion of foreign investors proper); *In re US. Fin. Sec. Litig.*, 69 F.R.D. 24 (S.D. Cal. 1975) (class including Latin American and European investors certified); *see also In re Cable & Wireless, PLC*, 321 F. Supp. 2d 749 (E.D. Va. 2004) (finding no "near certainty" that an English court would not recognize a US class action judgment in favor of foreign investors); *In re Lloyds Am. Trust Fund Litig.*, No. 96 Civ. 1262, 1998 U.S. Dist. LEXIS 1199, at *60 (S.D.N.Y. Feb. 4, 1998) (Sweet, J.) (including foreign investors in class action for breach of fiduciary duty); *In re Royal Dutch/Shell Sec Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005) (rejecting, on motion to dismiss for lack of jurisdiction, defendants' arguments that there was "near certainty" that foreign courts in, among other places, Holland, England, France, Germany and Austria, would not enforce a US class action judgment).

plaintiffs" when it is a "near certainty" that the defendants could not invoke a judgment in the US action as a bar to future claims against hypothetical future actions. In this case, however, as the competing foreign law affidavits show, there is no "near certainty" one way or the other as to what the res judicata impact would be of a judgment here; *indeed, one point that all parties' experts do agree on is that there are* ***no*** *controlling precedents on point in any of the foreign countries considered.* Moreover, even assuming (and contrary to fact) that it is somehow a "near certainty" that a US judgment would not be recognized abroad, theoretical res judicata issues would still not bar certification of a global class in this case.

A. There Is Plainly No "Near Certainty" That Foreign Courts Would Refuse To Recognize A Judgment By This Court

In the factually complex case of *Bersch v. Drexel Firestone.*, the Second Circuit first ***dismissed*** the plaintiffs' federal securities claims and then declined, on the specific facts presented, to certify a class based on the remaining *pendant common law fraud claims* to the extent it would have included foreign purchasers. 519 F.2d at 996. In so ruling, *Bersch* noted: "[w]hile an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is ***a near certainty***." *Id.* (emphasis added). Because the record contained "uncontradicted affidavits" that various foreign countries would not recognize a US judgment in that case, the *Bersch* court found that foreign law concerns were a factor that further supported its decision that any common law fraud class should exclude the foreign purchasers. *Id.*

In this case, however, Vivendi's foreign law affidavits do not go uncontradicted. To the contrary, consistent with this Court's prior instructions that defendants submit any

expert declarations first and that plaintiffs thereafter be allowed to submit their own declarations to any expert issues that might be raised (Parr Exs. 3-5), plaintiffs have submitted six expert affidavits that decisively rebut any notion that there is a "near certainty" that a judgment in this case would not be recognized. Each has been prepared by an eminent foreign scholar or practitioner, and those prepared in particular by Alexis Mourre, Esq. of Castaldi Mourre Sprague (French law), Prof. Jonathan Harris of the University of Birmingham (English law), and Prof. Peter Mankowski of the University of Hamburg (German law), are as comprehensive as law review articles. These declarations are further supported by a pre-eminent French international legal scholar, Prof. Helene Gaudemet-Tallon of the University of Paris II (Pantheon-Assas) (French law), Prof Hans Smit of Columbia University (Dutch, French, German and European civil law countries generally), and Dr. Leopold Specht (J.S.D.), Esq. of Austria.

Plaintiffs' experts are more measured than Vivendi's (who all opine that it is somehow "certain" that foreign courts would not recognize a US judgment). Instead, in the absence of controlling precedent (or indeed, any precedent at all), plaintiffs' experts conclude that there can be ***no certainty*** one way or the other, and that good arguments for recognition plainly exist that could reasonably be adopted by a foreign court. For example:

- Mourre ("French law): "The issue of the extent to which a U.S. class action judgment would be recognized and enforced in France has not been dealt with by French courts. Accordingly, there is no precedent directly on point that can be used on that question. *However, in my opinion, general principles of French private international law would favor the recognition of the U.S. judgment . . . .*" Mourre ¶17 (emphasis added);

- Harris (English law): "There is no clear English authority one way or the other as to the recognition and enforcement of a United States class action judgment in England. This means that one cannot say for certain whether a judgment in a U.S. class action would be enforceable or not. Nevertheless, *it is my opinion that, on the present state of English law, a good case exists for the recognition and enforcement of such a judgment in England* . . . ." Harris ¶11 (emphasis added);

- Mankowski (German law): "[In sum], although there is no controlling case law or German statute that provides a definitive answer one way or the other, the conclusion and opinion that I draw reads: one cannot rule out that a U.S. class action settlement or judgment in the pending class action against Vivendi, Messier and Hannezo will be recognized or enforced in Germany. To the contrary, there are instances . . . in which such recognition or enforcement can clearly be said not to collide with German public policy save for very exceptional circumstances which do not appear to be present here. *Generally, the arguments fielded against recognition or enforcement are not convincing, and can be met with substantial counter-arguments that could reasonably be adopted by a German court* . . . ." Mankowski ¶72 (emphasis added);

- Smit (Dutch, French, German and other European civil law): "[F]oreign purchasers who do not opt out will be regarded as bound by this Court's judgment in all of the foreign countries considered. These countries would properly conclude that the many benefits to the class members would more than justify holding unnamed members of the class bound by this Court's judgment, and that basic policies underlying legal provisions authorizing the exercise of jurisdiction over multiple and impleaded parties, as well as the doctrine of *negotiorum gestio* under which a non-specifically

authorized caretaker binds the person to whom his care is extended, justify holding foreign purchasers of the class who did not opt out bound by the class action judgment." Smit ¶106 (emphasis added); and

- Specht (Austrian law): Good arguments exist that the present rules on enforcement of foreign judgments are unconstitutional, and if they are overturned one cannot predict with any certainty what the new rules would provide regarding recognition of foreign judgments; moreover, even if the US judgment were not enforced it would still have significant practical legal effect in Austria in that the US judgment "would constitute prima facie evidence in an Austrian court for the facts it contains." Specht ¶¶23-25 (emphasis added).

Given these opinions and that even Vivendi's experts admit there are no controlling precedents, the Court should find that there is no "near certainty" as to the foreign law issues raised.

Indeed, where both sides have submitted competing affidavits on the res judicata issue, district courts have almost always certified a class that included foreign members. *E.g.*, *Cromer,* 205 F.R.D. at 135 (Cote, J.) (where British and Swiss law experts agreed on lack of controlling precedent but disagreed on likely outcome, court held "[a]s such, it is at most a 'possibility' that a defense verdict will have no res judicata effect abroad" and certified a multinational class); *Frietsch v. Refco,* 1994 U.S. Dist. LEXIS 312, at *29 (certifying class after reviewing competing affidavits on German law); *Turkcell,* 209 F.R.D. at 360 (certifying class after reviewing competing affidavits on Turkish law); *U.S. Financial,* 69 F.R.D. at 48-49, 52 (although plaintiffs' affidavits on the laws of France, Germany, Luxembourg, Great Britain, Belgium, Switzerland and Italy indicated that defendants "probably would not be bound," court still certified global class as there was still a "fair chance of recognition in foreign courts"); *see also In re Royal Dutch,*

380 F. Supp. 2d at 546-48 (rejecting defendants' res judicata arguments, ***and finding that plaintiffs' experts, which included the same experts who have submitted affidavits in this case (Mourre, Harris, Mankowski and Smit), "identifi[ied] credible arguments in favor of [foreign] enforcement on both class members and Defendants").***

In contrast, the cases primarily relied on by Vivendi where foreign investors were excluded are easily distinguishable because the courts there were presented with no foreign law affidavits, or only with defendants' uncontradicted affidavits. *Cf. Bersch,* 519 F.2d at 996 ("uncontradicted affidavits" from defendants); *CL-Alexanders Laing & Cruikshank v. Goldfeld,* 127 F.R.D. 454, 459 (S.D.N.Y. 1989) (uncontradicted defendants' affidavit on British law); *Ansari* v. *New York Univ.,* 179 F.R.D. 112, 116 (S.D.N.Y 1998) (no affidavits submitted at all). Moreover, in *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig., 228* F. Supp. 2d 348 (S.D.N.Y. 2002), the holding did not even involve class certification, and Judge Mukasey's comments on class certification (in dictum) simply noted that *if* plaintiffs were to later propose a class consisting of foreign residents, then the preclusive effect of a US judgment would be "*a* factor that *may* have to be addressed." *Id.* at 364 (emphasis added).[6]

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[6] *In re DaimlerChrysler AG Sec. Litig.,* 216 F.R.D. 291 (D. Del. 2003) appears to be the only case cited by Vivendi in which a court was presented with competing foreign law affidavits and then excluded the foreign purchasers. There, Judge Farnan found that plaintiffs' German law expert (who had submitted only a ten page affidavit addressing German law issues) (Parr Ex. 7) "ha[d] not adequately responded to Defendants' concerns" on the res judicata issue. *Id.* at 301. However, it is not clear that Judge Farnan applied the "near certainty" standard referenced in *Bersch,* since that standard is nowhere mentioned in his opinion. Moreover, here plaintiffs' primary expert submissions on German law (and other European law) are vastly more comprehensive, and were authored by the very same experts (Mourre, Harris, Smit and Mankowski) that Judge Bissell accepted as "persuasive" in *Royal Dutch.*

B. Practical Considerations Still Warrant Class Certification Even If The "Near Certainty" Test Were Met

Indeed, as Judge Mukasey's dictum suggests, "res judicata" is but *one, non-dispositive factor to* consider in assessing "superiority" under Rule 23(b)(3). *See In re Royal Ahold N.V. Sec. Litig.*, 219 F.R.D. 343, 352 (D. Md. 2003) ("This factor must be considered in determining whether a class action is the superior method of litigating a particular case, *although it is not determinative.*"). As Judge Sweet has similarly noted in discussing Second Circuit law:

> In *Bersch*, the issue was whether to allow the action to proceed as a class action on behalf of the foreign members of the class under principles of pendent jurisdiction. [519 F.2d] at 993. The court decided that federal securities laws did not apply to the foreign class members in that particular case, leaving only state claims. . . . The court held that the issue of *res judicata* was one of five issues the court should consider in deciding whether to exercise its discretion to maintain pendent jurisdiction. [519 F.2d at 996.] *Therefore, Bersch did not consider . . . whether the class action is superior, nor did it decide that the res judicata effect in foreign jurisdictions is dispositive of the issue it did consider.*

Lloyd's, 1998 U.S. Dist. LEXIS 1199, at *45 (certifying class despite five unrebutted foreign law affidavits showing that most foreign class members would not be bound) (emphasis added); *Cromer*, 205 F.R.D. at 135 ("Even where <u>all</u> the available evidence indicates that foreign plaintiffs who lose in the United States will be able to sue the defendant a second time in their own country, a class action may remain the superior means for litigating the dispute, particularly where the court can take action to increase the benefits for

the defendant as well as the plaintiffs.") (Cote, J.) (emphasis added).[7]

As *Cromer* also noted, there are simply too many contingencies involved concerning "possible" or "theoretical" res judicata issues for such concerns to prevent class certification:

> [M]any events would have to occur before [the defendant] would be prejudiced by an inability to assert the defense of *res judicata* successfully. Specifically, (1) the class action would have to be tried to judgment, despite the greater likelihood that the case would instead be settled; (2) the class would have to lose on the merits; (3) an absent class member would have to bring a subsequent lawsuit in an English or Swiss court, despite such practical deterrents as the unavailability of contingent-fee representations or a class action vehicle in those courts; (4) the absent class member would have to succeed in establishing jurisdiction over the defendants in that foreign court; [and] (5) the absent class member would have to convince the foreign court to ignore this Court's ruling and render judgment in its favor on the merits . . . .

Id. at 135 n.32. In this case, plaintiffs' experts similarly confirm that Vivendi's "res judicata" concerns are far more hypothetical than real, and the "real world" likelihood of any significant future re-litigation of this case in Europe is slim to none. As Prof. Smit observes:

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[7] For example, as Judge Cote noted "foreign courts, even if faced with a second round of litigation, may look to the results achieved in the [US] for guidance, and if the plaintiffs succeed or if the action were settled, a court-fashioned proof of claim mechanism might be able to bind all participants and discourage relitigation." *Cromer* at 135 (citing *Lloyd's* 1998 U.S. Dist. LEXIS 1199, at *45).

[If the case results in a recovery for plaintiffs,] foreign purchasers who did not opt out are unlikely to pursue an individual action against the Defendants, because they would not have the benefit of a U.S. style contingency fee agreement, would run the risk of having to pay the Defendants' counsel fees and cost of litigation and would run the additional, and significant, risk that the Defendants would successful[ly] invoke this Court's judgment as precluding their recovery. That being so, foreign members of the class who did not opt out are most likely to seek to participate in any recovery this Court may direct or approve. [Thus], only very few (if any) foreign purchasers who do not opt out are likely to ***not*** seek to participate in a recovery this Court may direct or approve (and those who are too busy, disinterested or lazy to file a proof of claim are surely the least likely to ever consider bringing their own action).

If the Defendants [prevail], foreign purchasers who did not opt out are most unlikely to pursue their individual actions in the foreign court, because the likelihood of prevailing after the Defendants had won in this Court would appear to be minimal and their exposure to having to pay the Defendants' cost and counsel fees would be substantial.

All in all, the likelihood of litigation by foreign purchasers in foreign courts would appear extremely small. Moreover, it would appear entirely inappropriate as a practical matter to foreclose access by foreign purchasers to the class action in this case merely in order to afford an extremely small number of individual purchasers the opportunity (after having initially declined to

> opt out) to pursue a second bite at the apple by pursuing their own individual actions.

Smit ¶105; *see id.* ¶¶20-25; *accord Mourre* ¶¶*17 n.2,* 50-54, 58, 160-63 (expressing "serious doubts," for several reasons, "as to whether as a practical matter there is a realistic likelihood" of future litigation); Mankowski ¶¶65-71, 73 ("in any event the enforcement questions presented appear, for practical purposes, to be moot and hypothetical on the specific facts of this case"); *see also U.S. Financial,* 69 F.R.D. at 48-49 (certifying class including foreign investors, and noting that factors such as absence of discovery and costs of bringing suit overseas made it "unlikely" that the defendants would be sued again overseas); *Turkcell,* 209 F.R.D. at 360-61 (same); *In re Int'l Nesmont Sec. Litig.,* Civ. No. 94-4202 (WGB), slip op. at 44 (D.N.J. Dec. 2, 1996) (US action superior as fraud-on-market theory is not available outside the US) (Parr Ex. 8).

C. The Pendency of the "Canoy Actions" In France Does Not Render The Class Action Device Any Less Superior Under Rule 23(b)(3)

Several of Vivendi's experts have attached copies of complaints in the *Pasturaud, Societe Victor Hugo* and *Courage* actions, which have all been filed against Vivendi by Maître Canoy, an attorney from the outskirts of Paris whose primary practice areas include divorce cases and representing police officers for the French interior ministry. This raises the question: Do the "Canoy actions" offer a "superior" mechanism for resolving French class member claims? The answer is plainly no.

First, Vivendi's assertion that these are "effectively class actions" is false (as are any representations to the contrary on Canoy's website, www.classaction.fr). As even Vivendi's experts concede, France has yet to enact a true class action statute, and the Canoy actions consist of a

joinder of approximately 97 *individual* shareholder claims. Mourre ¶136. Second, that Canoy has only recruited 97 shareholders (none of which appear to be of any size), despite months of vigorous self-promotion in the French media and on his website, is an indication of just how "comprehensive" his representation of Vivendi investors is (or likely ever will be) as a percentage of the more than *1 billion* shares of outstanding Vivendi stock. Gaudemet-Tallon ¶51. Finally, Canoy's ability to represent investors has not been approved by any court, and he has been subject to numerous ethics complaints, including a judgment against the "unnamed" operator of his website (i.e., Canoy) handed down on December 6, 2005 by the *Tribunal de Grande Instance* of Paris (Parr Ex. 9).

Vivendi's assertion that the Canoy action is a reasonable alternative for any serious Vivendi investor is preposterous. Equally so are Vivendi's wild claims that it might be exposed to claims for "double damages" if this action proceeds on a classwide basis since (a) the Canoy plaintiffs will get notice of the present action (and may well drop their risky involvement with Canoy when they become aware of this action), and (b) in any event, this Court can easily fashion a claims mechanism to prevent any hypothetical double-dipping. Smit ¶24-25.[8]

This Court has already ***twice*** determined that the defendants' conduct on US soil in perpetration of a fraudulent scheme warrants exercise of US jurisdiction. If defendants are exposed to greater liability and risk as a result,

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[8] Courts should be skeptical when defendants argue that a class action is "inferior" to "options" that defendants prefer. *U.S. Financial*, 69 F.R.D. at 50 ("This Court submits that [defendant] correctly perceives that, if this action is not certified as a class action, few [investors] will find it economically feasible to commence [meaningful] individual actions"); *see also* Smit ¶20; Gaudemet-Tallon ¶51 ("If Vivendi [seeks to avoid suit in the US], is it not precisely because it thinks that it has much less to fear from a French decision than from an American decision?").

that is a consequence of their own conduct, and warrants no sympathy from this Court. The US class action is superior in all respects, and incidentally also avoids discriminating against foreign citizens (Smit ¶27) and advances the federal policy of deterring foreign defendants from using the US as a base from which to violate the federal securities laws.

D. There Are No Manageability Problems Or Notice Issues That Warrant Exclusion Of Foreign Purchasers From The Proposed Class

Courts certifying global classes have consistently rejected the argument that providing notice to foreign class members presents a case manageability problem,[9] and Vivendi does not cite any case where "notice issues" rendered an investor class action unmanageable. *Cf. Lloyd's*, 1998 U.S. Dist. LEXIS 1199, at *47 (rejecting argument that manageability problems would arise if the notices relating to the action had to be sent in numerous foreign languages); *U.S. Financial*, 69 F.R.D. at 46 ("[e]qually without merit is defendant's [contention that] the inability to identify [up to 42% of the foreign] debenture holder[s] prevents effective notice).[10]

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[9] *See, e.g., Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., Inc.*, 820 F.2d 1359, 1361-63 (4th Cir. 1987) (approving notice program to over 90 countries and involving mass media public service announcements, outreach to government agencies, and press releases); *Montelongo v. Meese*, 803 F.2d 1341, 1352 (5th Cir. 1986) (upholding notice to international class of migrant farm workers through bilingual letters, media campaigns and personal contacts); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 144 (E.D.N.Y. 2000) (approving worldwide, multilingual notice program to class of Holocaust victims).

[10] Vivendi's argument that adequate notice cannot be provided to foreign class members because Rule 23(c)(2)(B) requires that the notice mention "the binding effect of a class judgment on class members" is a red herring. As stated above, courts have not hesitated to certify global classes even if the preclusive effect of a US judgment is uncertain. Moreover, Rule 23 does not state that the notice must inform class

Due process and Rule 23(c)(2) mandate that the court "direct to class members the best notice practicable under the circumstances," but require individual notice only to "all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173 (1974); *see* Rule 23(c)(2)(B); *Denney v. Jenkens & Gilchrist,* 230 F.R.D. 317, 343-44 (S.D.N.Y. 2005) (Scheindlin, J.) ("It is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected."); *U.S. Fin.*, 69 F.R.D. at 47 ("In this Court's view, notice by publication is the best practicable method of informing unknown debenture holders of this matter.").

With these rules in mind, plaintiffs have retained Todd Hilsee of Hilsoft Notifications *(Hilsoft),* which specializes in designing, analyzing and implementing large-scale legal notification plans, and which has provided notice in 175 major cases in a total of 53 countries and 36 foreign languages. Hilsoft has also been retained to design the notice program for the recently announced global investor class action Settlement in *Royal Ahold.* Hilsee has provided expert testimony on notice issues in numerous cases, and has worked with the Federal Judicial Center on class notice issues. Hilsee ¶¶1-5. Having reviewed Vivendi's submissions, Hilsoft is confident it can provide both US and foreign purchasers with requisite notice. *Id.* ¶¶8-17.

Vivendi asserts that, because it "does not have access" to information allowing it to identify its own shareholders, it will be impossible to provide adequate notice. However, that

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members that a US judgment will be binding as to all potential future actions, but only that it mention the "binding effect of a class judgment." In this case, a notice could appropriately advise that a judgment by this Court will bar foreign class members from pursuing claims in the US, and *may* bar pursuit of claims abroad.

Vivendi does not "know" the identity of its individual shareholders is not unlike the situation of US companies, whose stock is held primarily in "street name." For example, Vivendi appears to have maintained a periodically updated "Shareholders List" that (while not necessarily identifying actual beneficial owners of Vivendi shares) sets forth by name, address, email and phone number and contact person a list of ***over 430*** US, French and other European financial institutions, together with their total beneficial holdings of Vivendi shares (which appear to constitute a substantial majority of all ordinary and ADS shares outstanding as of various dates throughout the Class Period) (Parr Ex. 10). Since the class consists of those who *purchased* Vivendi stock during the class period, major brokerage firms (who can be readily identified) will certainly have additional trading information that will ultimately allow individual notice to be given to a very large percentage of the class. Moreover, despite Vivendi's assertion that French law prohibits it from gaining access to identifying information concerning those who hold its "bearer" stock, plaintiffs' proposed Notice Administrator (as is customary in the US) can provide copies of the Notice (in the appropriate languages) to the relevant financial intermediaries for *them* to forward to potential individual class members. Hilsee ¶17.

Finally, even if some financial intermediaries do not cooperate in providing notice and some class members cannot be given individual notice through reasonable effort, Hilsee is "confident that the carefully designed publication plan we will undertake here (particularly when combined with other forms of notice through Vivendi's website and other shareholder communications channels) will fully satisfy this Court." *Id.* ¶17.[11] In this regard, although *Bersch*

[11] Vivendi mischaracterizes the holdings of the two cases on which it relies, *Greenfield v. Villager Indus. Inc.*, 483 F.2d 824 (3d Cir. 1973) and *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). In both cases, the court held publication notice was inadequate as to the *ascertainable* class

expressed some concern about providing effective notice to foreign shareholders, that opinion was written 30 years ago, prior to the internet. In this case, a neutral website can provide downloadable information (including the notice) in numerous languages, and the Court can also order Vivendi to provide a link to that site and information about the case through its own website and in its own shareholder communications.[12]

III. VIVENDI'S EFFORT TO EXCLUDE INVESTORS WHO HAVE "NO DAMAGES" IS PREMATURE

The argument that the class should not include those persons who have no damages is correct, but the solution is to insert the words "and were damaged thereby" into the class definition. This addresses Vivendi's concerns, without prematurely excluding valid claims.

In any event, Vivendi's attempt to revive an argument, traceable to *In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. 1341 (N.D. Cal. 1994), by asserting that *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005) (which merely addressed the *pleading* standard for loss causation) requires exclusion of "in and out" investors should be rejected. The "in and out" argument was almost uniformly rejected prior to *Dura (see, e.g., In re Oxford Health Plans, Inc. Sec. Litig.*, 191 F.R.D. 369, 377 (S.D.N.Y. 2000); *In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62, 69-71 (S.D.N.Y. 1999); *see also Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975); *In re Rent-Way Sec. Litig.*, 218 F.R.D. 101, 120 (W.D. Pa. 2003)) and

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members because Rule 23(c)(2)(B) requires that such class members receive individual notice. *Greenfield*, 483 F.2d at 830-31; *Molski*, 318 F.3d at 952-53. Nothing in these cases suggests that publication notice alone would be inadequate for *unascertainable* class members.

[12] Plaintiffs' foreign law experts also conclude that individual notice where possible, combined with publication and internet notice, would be deemed sufficient by European courts. Mourre ¶¶71-72; Gaudemet-Tallon ¶49; Harris ¶¶42, 49; Mankowski ¶¶45-50; Smit ¶¶47, 62.

the Second Circuit has emphatically ruled that issues relating to damages cannot be a basis for denying class certification. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001); *see also Jones v. Ford Motor Credit Co.*, No. 00 Civ. 8330, 2005 U.S. Dist. LEXIS 5381, at *50-52 (S.D.N.Y. Mar. 31, 2005) (Holwell, J.) (rejecting defendants' argument that plaintiff was atypical because she had no injury, stating that "it is well established that courts deciding motions for class certification are not [to] consider the merits of plaintiffs' claims"). At most, *Dura* requires only the modest class definition change suggested above.[13]

Similarly, Vivendi argues that class members who acquired shares of Vivendi Universal by exchanging shares of Vivendi, S.A. should be excluded from the class because: (a) they suffered no damages; and/or (b) defendants' misstatements were not material as to them. However, Vivendi has already attempted, unsuccessfully, to strike Olivier Gerard as a proposed class representative on this very basis (Apr. 22, 2005 Order (Holwell, J.) (Parr Ex. 6); Apr. 21, 2005 Tr. at 4 (Parr Ex. 5)), and numerous courts have held that materiality is not appropriately raised at the class certification stage. *E.g., In re WorldCom,* 219 F.R.D. at 300 n.43 ("If it is an argument about materiality, then it should have been made in connection with the motion to dismiss or may be made at the time for summary judgment. It does not, however, show that a class should not be certified."); *see also TSC Indus. v. Northway Inc., 426* U.S. 438, 450 (1976); *In re*

[13] As Judge Scheindlin has also noted, "[a]ny securities fraud class action runs the risk of including individual investors who may be ineligible for recovery for any number of reasons, including actual knowledge of the alleged fraud. If the possibility that certain class members might eventually be excluded were sufficient to preclude class certification, there could *never* be a securities fraud class action." *In re IPO Sec. Litig.*, 227 F.R.D. 65, 103 (S.D.N.Y. 2004).

Global Crossing, Ltd Sec. Litig., 313 F. Supp. 2d 189, 208-09 (S.D.N.Y. 2003).[14]

IV. THE PROPOSED CLASS REPRESENTATIVES ARE APPROPRIATE[15]

Vivendi's assertion that plaintiffs must make a detailed evidentiary showing as to each proposed class representative's adequacy in their opening brief is wrong, and contrary to common practice. *E.g., Jones v. Ford Motor Co.*, 2005 U.S. Dist. LEXIS 5381, at *18 ("although plaintiffs have the burden of establishing that the requirements of Rule 23 have been met, . . . they are not required to make an extensive evidentiary showing") (citing *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999); *In re WorldCom*, 219 F.R.D. at 279 n.17 ("While the plaintiffs' motion was pro forma, the defendants have not identified any prejudice. They were permitted . . . to take two depositions of persons associated with each named plaintiff, . . . in addition to obtaining extensive documentary evidence from the named plaintiffs. . . . Although this is a massive case, the issues it presents are far from novel. The

[14] Even if the Court were to address materiality at this stage, plaintiffs have alleged that the three-way merger among Vivendi, Seagram and Canal Plus was fundamentally flawed in that it was based on, among other things, materially misleading financial statements, e.g., Complaint ¶¶54-55 (Parr Ex. 11), and that the merger actually resulted in materially weakening the combined company, *e.g.*, *id.* ¶¶129-45. Yet Vivendi extolled the virtues of the proposed merger in the October 30, 2000 registration statement and prospectus. At a minimum, plaintiffs' allegations raise a question of fact as to whether the misstatements contained in the registration statement and prospectus were material to Vivendi, S.A. shareholders, as well as to former Seagram and Canal Plus shareholders, since the newly merged entity was weaker than the sum of its parts.

[15] As this Court recently noted, "'a court must be wary of a defendant's efforts to defeat representation of a class [on] grounds of inadequacy when the effect may be to eliminate any class representation.'" *Jones v. Ford Motor Credit Co.*, 2005 U.S. Dist. LEXIS 5381, *57 (quoting *Kline v. Wolf*, 702 F.2d 400, 402-03 (2d Cir. 1983)).

motion for class certification was sufficient in the circumstances.").[16]

A. Gerald Morel

Vivendi argues that Morel cannot represent those who bought Vivendi shares after the date of his last purchase. However, as Judge Cote held in *Cromer*, "[t]his argument is groundless." 205 F.R.D. at 125. Judge Cote is plainly in the majority.[17]

Viverdi attempts to distinguish this clear weight of authority by relying on dicta from a footnote in *Zucker v. Sasaki*, 963 F. Supp. 301, 307 n.6 (S.D.N.Y. 1997). However, in *Zucker*, the court noted that (unlike this case) the plaintiff did not allege "a [series] of 'inter-related

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[16] None of Vivendi's cases - *In re Am. Med. Sys.*, 75 F.3d 1069 (6th Cir. 1996); *Locaro v. Chicago Comm. Corp.*, No. 89-1206, 1990 U.S. Dist. LEXIS 6574 (E.D. Pa. May 31, 1990); *West v. First Penn. Banks N.A.*, No. 89-4730, 1991 U.S. Dist. LEXIS 1685 (E.D. Pa. Feb. 12, 1991) — hold that plaintiffs must make an evidentiary showing as to a proposed class representative's typicality or adequacy in their *opening* class certification papers — especially since opening briefs are typically filed *before* (rather than *after)* completion of class discovery. Rather, in each of those cases (unlike this one), plaintiffs failed to demonstrate the requirements of Rule 23 even *after* the plaintiffs' reply briefs and affidavits had been filed.

[17] *E.g., Robbins v. Moore Med. Corp.*, 788 F. Supp. 179, 187 (S.D.N.Y. 1992); *Nicholas v. Poughkeepsie Sav. Bank/FSB*, No. 90 Civ. 1607, 1990 U.S. Dist. LEXIS 12677, at *1446 (S.D.N.Y. Sept. 26, 1990); *Blackie v. Barrack*, 524 F.2d at 908-10; *In re Gen. Instrument Corp. Sec. Litig.*, No. 96 C 1129, 1999 U.S. Dist. LEXIS 18182, at *1142 (N.D. Ill. Nov. 18, 1999); *In re Intelligent Elecs., Inc. Sec. Litig.*, No. 92-1905, 1996 U.S. Dist. LEXIS 1713, at *14 (E.D. Pa. Feb. 13, 1996); 7 NEWBERG ON CLASS ACTIONS § 22.26 (4th ed. 2002); *see also Robidoux v. Celani*, 987 F.2d 931 (2d Cir. 1993); *Green v. Wolf*, 406 F.2d 291, 299-301 (2d Cir. 1968); *IPO*, 227 F.R.D. at 94-95 ("[t]he factual background of each named plaintiff's claim need not be identical to that of all the class members as long as 'the disputed issue of law or fact occup[ies] essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class").

misstatements' as part of a 'common course of conduct.'" *Id.* at 306 (citations omitted).[18]

B. Olivier Gerard

The argument that Olivier Gerard cannot be a class member because he acquired his post-merger shares in exchange for old Vivendi shares fails for the reasons set forth in § III above. Vivendi also asserts, without citing a single example, that Mr. Gerard "is incapable of performing the fiduciary responsibilities of a class representative" because he admits to destroying "relevant documents." However, as plaintiffs noted at the July 25, 2005 hearing, Vivendi does not (and cannot) legitimately contend that Mr. Gerard disposed of any of these documents (notably newspapers articles) in violation of any obligation to preserve documents.[19] E.g., *IPO,* 227 F.R.D. at 98 ("There is no evidence that any of the conduct here was the result of bad

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[18] Vivendi also insists that Mr. Morel, a French citizen who voluntarily traveled from Paris to New York to be deposed in this case, is an inadequate class representative because he was unable to clarify a seeming discrepancy in his trading records during his deposition. Morel Dep. 120:7-121:22 (Parr Ex. 16). However, as explained during a July 25, 2005 hearing before Judge Pitman, this confusion only arose because Vivendi used an illegible trading document at his deposition. July 25, 2005 Tr. at 69:17-22 (Parr Ex. 15). Plaintiffs' counsel resolved the issue by providing Vivendi with a clearer copy of the document at the hearing (Parr Ex. 17). Thus, Vivendi's accusation that "it is not even clear how many Vivendi Universal shares [Mr. Morel] acquired" is wrong, and Morel's inability to immediately explain a seeming discrepancy when questioned by Vivendi on a partly illegible document obviously does not undermine his ability to represent the class. *E.g., IPO,* 227 F.R.D. at 98.

[19] July 25, 2005 Tr. 77:4-11 (Plaintiffs' Counsel: "I think what Mr. Gerard was testifying to is that once he became involved in this class action – and we're talking about *news articles* here, Your Honor – that he simply stopped keeping news articles as may have been his practice in the past because the information that's in the news, once be he becomes involved in the class action, is getting through to his lawyers as well. I don't think there's any obligation if you read a newspaper to carry it home and save it forever.") (emphasis added) (Parr Ex. 15).

faith or an attempt to deceive defendants or the court. . . . Such conduct does not render [plaintiff] inadequate to prosecute the interests of the class.").

C. Retirement System Of Miami Beach

Vivendi asserts that Miami Beach lacks sufficient knowledge of the litigation?[20] However, Miami Beach's 30(b)(6) deposition testimony clearly proves otherwise. For example:

- Rick Rivera, Miami Beach's Pension Administrator, understood that Miami Beach was seeking to become a class representative, as such it would seek damages on behalf of the entire class, and that his responsibilities would include following the case, reviewing documents and filings, and consulting with counsel. Rivera Dep. 152:22-153:14, 150:2-6 (Parr Ex. 19). He knew that, as a class representative, Miami Beach would need to keep in mind the best interests of the class, *id.* 153:24-154:3, which he knew would include all members who had sustained damages as a result of Vivendi's fraud, *id.* 107:3-8. He also identified the other proposed class representatives. *Id.* 151:17-21.

- He knew the exact beginning and end dates of the class period, *id.* 49:10-12, 129:15-16, and that the complaint alleges that "defendants provided false statements that inflated the stock price," *id.* 59:15-23. He identified all three defendants by name. *Id.* He was also familiar with the three-way merger that created Vivendi Universal,

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[20] Vivendi also asserts that Miami Beach's claims must be rejected to the extent it acquired its Vivendi Universal ADSs as part of the three-way merger in exchange for its old Vivendi, S.A. and Canal Plus ADSs. This argument has already been addressed at § III, *supra*.

S.A., and was able to identify all three parties to that merger. *Id.* 86:10-87:6.[21]

The Supreme Court has "expressly disapproved of attacks on the adequacy of a class representative based on the representative's ignorance" *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 370-374 (1966).[22] Similarly, in *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 61-62 (2d Cir. 2000), the Second Circuit provided permissive guidance for determining whether a proposed class representative has sufficient knowledge of the claims asserted:

> [T]here is no showing that [plaintiff] is unwilling or unable to pursue the litigation on behalf of the class.... [H]e understood the nature of his proposed role in the litigation and demonstrated his willingness to carry it forward. When he was shown his signature on the certificate, he was able to explain that it indicated his willingness to accept the responsibility to "represent a class during the court for Rickel's, the bonds. I would be a representative, a plaintiff of a class. . . ." The record shows that he understood that the Rickel investments were the subject of this litigation; he understood that he and others had sustained a loss due to the alleged fraud. . . . The acknowledgment

[21] Vivendi attempts to make much of the fact that Mr. Rivera lacked precise answers to questions that would have been more appropriately asked of class counsel. Rivera Dep. 154:4-8 (res judicata issues); *id.* 74:18-75:4 (class notice issues); *see also id.* 75:17-22, 104:12-14, 113:9-18, 181:19-182:15, 146:12-25, 173:24-174:14.

[22] Vivendi also asserts that Miami Beach is inadequate because it has not produced three documents from another litigation in which it sought to serve as a class representative. However, as plaintiffs have told Vivendi, these three documents (only two of which Vivendi actually requested) could not be obtained because they were filed under seal and the lead counsel firm in that case refused all requests to produce them citing the confidentiality order in that case (Parr Exs. 21-23).

> of advice and support from . . . his attorneys cannot support a conclusion that Brett is unable to pursue the litigation on behalf of the class. [Rather], it demonstrates Brett's ability to appreciate the limits of his knowledge and rely on those with the relevant expertise.[23]

Vivendi erroneously relies on *Scott v. N Y. City Dist. Council of Carpenters Pension Plan,* 224 F.R.D. 353 (S.D.N.Y. 2004) and *Levine v. Berg*, 79 F.R.D. 95 (S.D.N.Y. 1978). In *Scott,* the proposed class representative did not know, among other things, whether the lawsuit was a class action or whether he was a class representative, and demonstrated a complete lack of awareness of the most basic nature of the lawsuit (testifying that the case was about "'nepotism' in the union," instead of an ERISA claim about the calculation of pension payments). And in *Levine,* the plaintiff "was unable to articulate . . . the wrong purportedly practiced upon her and the proposed class" and showed "an alarming adversity" to pursuing the claims. *Id.* at 97-98.[24]

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[23] *See also Fogarrazo v. Lehman Bros., Inc.*, No. 03 Civ. 5194 (SAS), 2005 U.S. Dist. LEXIS 15570, at *13 (S.D.N.Y. July 25, 2005) (Scheindlin, J.) ("[I]t is well established that 'in complex litigations such as securities actions, a plaintiff need not have expert knowledge of all aspects of the case to qualify as a class representative, and a great deal of reliance upon the expertise of counsel is to be expected.'") (citations omitted); *IPO*, 227 F.R.D. at 97-98 ("[I]t is unreasonable to expect an ordinary investor . . . to have the requisite sophistication and legal background to assist counsel in assessing liabilities under the securities laws.") (citations omitted); *WorldCom,* 219 F.RD. at 286 ("Plaintiffs are entitled to rely on the 'expertise of counsel.").

[24] *Greenspan v. Brassler*, 78 F.R.D. 130 (S.D.N.Y. 1978) and *Darvin v. Int'l Harvester Co.*, 610 F. Supp. 255 (S.D.N.Y. 1985) are pre-Baffa and also readily distinguishable. In *Greenspan,* the court denied class representative status not only on the basis of plaintiffs' unfamiliarity with the case, but also because the plaintiffs had failed to allege reliance on defendants' purported misrepresentations (and also found that failure to allege reliance was indicative of a lack of typicality). Similarly, in *Darvin,* class representative status was denied primarily because the

D. William Cavanagh

Vivendi erroneously contends that Cavanagh is an inadequate class representative because he purportedly lacks knowledge of certain aspects of the litigation.[25] As set forth below, Cavanagh is much more knowledgeable than the plaintiff in *Baffa*. For example:

- Mr. Cavanagh, a business consultant with an M.B.A. and an undergraduate degree in international relations, was fully aware that he was a proposed class representative together with several others (including some who lived abroad and a pension fund). Cavanagh Dep. 97:22-24; 98:21-23; 118:17-19.

- He knew that as a class representative he would have an obligation "to represent the class members to the best of my ability, in discussions with my attorney," *id.* 278:4-9, and that he had an obligation to supervise class counsel, *id.* 278:25-279:4.

- He knew that the action was brought against Vivendi and its former CEO and CFO, and demonstrated a clear awareness of the claims. *Id.* 117:20-25, 254:20-255:22.

- He understood the nature of a class action lawsuit. *Id.* at 118:25-119:4. He had read the complaint twice during the 30 days before his deposition, *id.* at 148:12-22, and testified that (despite not seeking class representative status until 2005) he had followed the progress of the

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plaintiff had given flagrantly inconsistent testimony, which "could create serious problems with respect to plaintiff's credibility and could become the focus [of the litigation]." 610 F. Supp. at 257.

[25] Vivendi emphasizes the number of times Mr. Cavanagh said "I don't recall." However, the primary reason for this is that Vivendi repeatedly asked certain questions over and over again. *See, e.g.*, Cavanagh Dep. 311:6-314:14 (Parr Ex. 24).

litigation since filing his own complaint against Vivendi and Messier in August 2002, *id.* at 299:13-300:19. When asked why he would make a good class representative, he replied: "I think I represent a typical investor who relied on publicly stated facts about the company to make an investment decision, was damaged by the fact that the management team was concealing the true nature of the company and would hope to vigorously contest my case, along with my counsel." *Id.* at 306:2-8.[26]

E. Bruce Doniger

Vivendi argues that Mr. Doniger's familial relationships with Edgar Bronfman Sr. and Charles Bronfman (they are distant cousins) undermines his adequacy as a class representative.[27] However, in the case cited by Vivendi *(Landry v. Price Waterhouse Chartered Accountants,* 123 F.R.D. 474, 476 (S.D.N.Y. 1989)), the court refused to certify the proposed class representatives because they "would be required to devote considerable time to rebut the claim that their purchases were based not on the integrity of the market, but on non-public information." In contrast, in this case, Mr. Doniger testified that he has never met Edgar Bronfinan Jr., has not spoken to Edgar Bronfman Sr. in five years, and has not spoken with Charles Bronfman since shortly after the September 11 terrorist attacks. Mr. Doniger further testified that he had not spoken with either Edgar or Charles Bronfman regarding his acquisition of Seagram

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[26] Vivendi's assertion that Mr. Cavanagh is unwilling to monitor class counsel is just wrong. Mr. Cavanagh has been in regular contact with Abbey Gardy, co-lead counsel in this action, and plaintiffs are unaware of any requirement that a class representative communicate regularly with *every* attorney involved in a litigation.

[27] Mr. Doniger acquired his Seagram securities as gifts from his parents, and later exchanged them for Vivendi ADSs pursuant to the three-way merger. Doniger Dep. 101:15-19 (Parr Ex. 25).

shares, or his involvement in this case. Doniger Dep. 21:2-23:15.[28]

F. Capital Invest

Capital Invest is a subsidiary of Bank Austria. It is one of Austria's largest fund managers, and has also been appointed as a lead plaintiff by other US courts to represent investors in other major securities fraud suits.[29] Capital Invest has not only responded to multiple sets of document requests and interrogatories, but, *at the insistence of Vivendi,* has flown (at considerable time and expense) not one but ***two*** of its representatives from Vienna to be deposed in New York.

Nonetheless, Vivendi devotes four pages of its brief to asserting an utterly baseless argument that Capital Invest (which is suing on behalf of, and in its capacity as attorney-in-fact and fund manager of, the APK EU-Big Caps Fund (the *Big Caps Fund))* lacks standing. Relying on two cases that have held that an investment advisor (as agent) does not have standing to represent his investment client (as principal) unless the investment advisor had "unrestricted investment authority" over his client's accounts, Vivendi argues that Capital Invest never had such unfettered investment power because: (a) the owners of the shares (units) in the Big Caps Fund — a large Austrian pension entity known as APK Pensionskasse Aktiengesellschaft *(APK)* — "participated" in

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[28] Vivendi also argues that Mr. Doniger does not have standing to bring claims based upon alleged misstatements issued after the three-way merger in which he acquired Vivendi ADSs in exchange for Seagram shares. For the reasons stated in § III, *supra,* Vivendi is incorrect.

[29] *E.g., In re Goodyear Tire & Rubber Co. Sec. Litig.,* No. 5:03cv2166, 2004 U.S. Dist. LEXIS 27043, at *23 (N.D. Oh. May 12, 2004) ("Capital Invest possesses standing to assert securities fraud claims on behalf of the clients for whom it purchases and sells securities"); *Marsden v. Select Med. Corp.,* No. 04-4020, slip op. at 1 (E.D. Pa. Feb. 16, 2005) (appointing Capital Invest as lead plaintiff "for account of its funds") (Parr Ex. 43); *Blechner v. Daimler-Benz AG,* No. 04-cv-331, slip op. (D. Del. Sept. 14, 2004) (same) (Pan- Ex. 44).

reviewing the Fund's investment strategies through an investment committee; and (b) Austrian law (like US law) sensibly imposes certain restrictions on a fund manager's ability to invest pension fund assets. Thus, Vivendi asserts, only APK (the Austrian pension fund) — and not Capital Invest — has standing to sue in this case.[30]

However, as plaintiffs have told Vivendi in the past, its "investment discretion" argument is completely inapposite here since the actual entity that bought Vivendi shares was not an investment advisory "client" (e.g., as in the case of a client whose shares are bought by her broker/advisor, where the broker then seeks to sue), but a ***mutual*** or "***special fund***" (Big Caps Fund) that has no employees or representatives ***except*** for its duly-appointed fund manager (Capital Invest), which as a matter of Austrian law is authorized to act for the fund in basically all matters.

In other words, the only relevant question here is, "Who has the authority to act *for the Big Caps Fund?*", and the unsurprising answer to that question is Capital Invest. As plaintiffs' Austrian law expert, Dr. Leopold Specht, states in his declaration:

> Among the general powers conferred on an investment company [such as Capital Invest] which flow from §3 [of the Austrian Investment Funds Act] . . . is the power to bring suit on behalf of the funds (whether ordinary mutual funds or special funds) that it manages. Indeed, . . . earlier

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[30] Although irrelevant, plaintiffs note that, as in *In re Rent-Way Sec. Litig.*, 218 F.R.D. at 108-09, the legal restrictions on Capital Invest's investment discussed by Vivendi's expert were customary and routine, and in no way undermine the conclusion that Capital Invest had very broad — if not "totally" unrestricted — investment discretion. Specht ¶¶11-20; *see also* Kellner Dep. 22:16-21, 75:16-19, 79:9-11, 110:25-111:4, 111:16-18, 164:7-10, 164:22-165:4 (Capital Invest, not APK, made the investment decisions).

> this year I asked the Austrian Financial Market Authority (the "FMA") (which, since March 2002, has had general supervisory powers over Austrian investment fund companies) to confirm in writing Capital Invest's authority to sue on behalf of Apk Big Caps Fund. In response, the FMA stated:
>
> > ***The FMA [hereby] confirms that*** Capital Invest is empowered to dispose of [the assets of] special fund APK EU-Big Caps pursuant to para. 3 of the Austrian Investment Fund Act. Furthermore, ***Capital Invest is entitled to appear in court in Austria and abroad on behalf of the Fund, to authorize attorneys to represent it, and to bring legal actions on behalf of the Fund.***

Specht ¶7. and Exh. B thereto (emphasis added). *Indeed, as Dr. Specht notes: (a) only Capital Invest is entitled to bring suit on behalf of the Big Caps Fund; (b) APK (the owner of 100% of the shares issued by the Big Caps Fund) has no authority to sue on behalf of the Fund; and (c) Vivendi's own expert [Mr. Herbst] concedes that it is the fund manager (Capital Invest), not the fund shareholder (APK) that may bring suit on behalf of the Big Caps Fund. Id.* ¶¶9-10.[31]

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[31] Moreover, although Capital Invest (and not APK) is clearly the proper party to sue on behalf of the Big Caps Fund, Rule 17(a) expressly provides for ratification by the "real party in interest" if there is any doubt. *Icon Group Inc. v. Mahogany Run Dev. Corp.*, 829 F.2d 473, 478 (3d Cir. 1987); *Pemex-Refinacion v. Tbilisi Shipping Co.*, 04 Civ. 02705, 2004 U.S. Dist. LEXIS 17478, at *15 (S.D.N.Y. Aug. 29, 2004); *see also Rent-Way*, 218 F.R.D. at 110. Since the Big Caps Fund is a paper entity only, the only possible "other" real party in interest is APK — and APK has submitted herewith a declaration confirming its "complete support for and ratification of all of the actions taken by Capital Invest on behalf of the Fund in connection with this action" (while noting that it had always understood that Capital Invest had this authority anyway), as well as its

CONCLUSION

For the foregoing reasons and the reasons described in plaintiffs' opening brief, the motion for class certification should be granted.

Dated: December 21, 2005

Respectfully submitted,

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willingness to be bound by Capital Invest's actions in this case. Böhm & Ungerböck ¶¶4-5.

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APPENDIX Q

VIVENDI UNIVERSAL, S.A.'S SUR-REPLY MEMORANDUM OF LAW IN FURTHER OPPOSITION TO PLAINTIFFS' SUBSTITUTED MOTION FOR CLASS CERTIFICATION, FILED FEBRUARY 6, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	Civil Action No. 02 Civ. 5571 (RJH/HBP)

VIVENDI UNIVERSAL, S.A.'S SUR-REPLY MEMORANDUM OF LAW IN FURTHER OPPOSITION TO PLAINTIFFS' SUBSTITUTED MOTION FOR CLASS CERTIFICATION

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CITATION CONVENTIONS

The following conventions will be used throughout this Sur-Reply Memorandum:

Names:

"Vivendi" or the "Company" for references to Vivendi Universal, S.A.

"Seagram" for references to The Seagram Company Ltd.

"ApK" for references to Apk-Pensionskasse Aktiengesellschaft.

Pleadings:

"3/27/03 MTD" for references to the Memorandum in Support of Defendant Vivendi Universal, S.A.'s Motion to Dismiss the Consolidated Class Action Complaint, dated March 27, 2003.

"11/21/03 MFR" for references to the Memorandum of Law in Support of Defendant Vivendi Universal, S.A.'s Motion for Reconsideration of the Court's November 6, 2003, Opinion and Order, dated November 21, 2003.

"Answer" for references to the Answer and Defenses of Defendant Vivendi Universal, S.A. to Plaintiffs' First Amended Consolidated Class Action Complaint, dated February 11, 2004.

"Hann. Ans." for references to the Answer and Affirmative Defenses of Guillaume Hannezo to the First Amended Consolidated Class Action Complaint, dated February 11, 2004.

"Opp. Br." for references to Vivendi Universal, S.A.'s Memorandum in Opposition to Plaintiffs' Substituted Motion for Class Certification, dated October 5, 2005.

"Reply Br." for references to Plaintiffs' Reply Memorandum of Law in Further Support of Their Substituted Motion for Class Certification, dated December 21, 2005.

Declarations Submitted in Support of Vivendi's Opposition Brief:

"Audit ¶ __" for references to the Declaration of Bernard Audit, dated September 27, 2005.

"Bisiaux ¶ __" for references to the Declaration of François Bisiaux in support of Vivendi Universal, S.A.'s Opposition to Plaintiffs' Motion for Class Certification, dated September 30, 2005.

"Carcassonne ¶ __" for references to the Declaration of Guy Carcassonne, dated September 23, 2005.

"Cohen ¶ __" for references to the Declaration of Daniel Cohen, dated October 3, 2005.

"de La Pradelle ¶ __" for references to the Declaration of Géraud de Geouffre de La Pradelle, dated September 29, 2005.

"Gompers I ¶ __" for references to the Declaration of Paul A. Gompers, dated October 3, 2005.

"Herbst ¶ __" for references to the Declaration of Christian Herbst, dated October 1, 2005.

"Rabinowitz ¶ __" for references to the Declaration of Laurence Rabinowitz, Q.C., dated September 29, 2005.

"Renard-Payen ¶ __" for references to the Declaration of Olivier Renard-Payen, dated September 27, 2005.

"Terré ¶ __" for references to the Declaration of François Terré, dated September 30, 2005.

"Wegen ¶ __" for references to the Declaration of Gerhard Hermann Otto Wegen, dated September 27, 2005.

Declarations Submitted in Support of Plaintiffs' Reply Brief:

"Bhagat ¶ __" for references to the Declaration of Sanjai Bhagat, dated December 14, 2005.

"B-U ¶ __" for references to the Declaration of Christian Böhm and Alfred Ungerböck, dated December 16, 2005.

"GT ¶ __" for references to the Declaration of Hélène Gaudemet-Tallon, dated December 1, 2005.

"Harris ¶ __" for references to the Declaration of Jonathan Harris, dated December 8, 2005.

"Mankowski ¶ __" for references to the Declaration of Peter Mankowski, dated December 12, 2005.

"Mourre ¶ __" for references to the Declaration of Alexis Mourre, dated December 6, 2005.

"Nettesheim ¶ __" for references to the Declaration of Jane D. Nettesheim, December 19, 2005.

"Parr Ex. __" for references to exhibits to the Declaration of M. Elizabeth Parr in Further Support of Plaintiffs' Substituted Motion for Class Certification, dated December 21, 2005.

"Specht ¶ __" for references to the Declaration of Leopold Specht, dated December 16. 2005.

"Smit ¶ __" for references to the Declaration of Hans Smit, dated December 20, 2005.

Declarations Submitted in Support of Vivendi's Sur-Reply Brief:

"C-DLP ¶ __" for references to the Joint Declaration of Daniel Cohen and Géraud de Geouffre de la Pradelle, dated February 3, 2006.

"Gompers II ¶ __" for references to the Declaration of Paul A. Gompers, dated February 3, 2006.

Other:

"Doniger Dep." for references to the deposition transcript of Bruce Doniger, dated May 17, 2005.

"Form 990-PF" for references to the J.E. & Z.B. Butler Foundation Form 990-PF, Part VIII (2004).

"Fr. Govt. Rpt." for references to the Report from Guillaume Cerutti, Director General of Competition, Consumer Affairs and the Repression of Fraud, and Marc Guillaume, Director of Civil Affairs and of the Seal, to Thierry Breton, Minister of the Economy, Finance and Industry, and Pascal Clement, Minister of Justice, Keeper of the Seal, dated December 16, 2005.

"VU 2001 20-F" for references to the Vivendi Universal, S.A., 2001 Annual Report (Form 20-F) (May 28, 2002).

"VU 2002 20-F" for references to the Vivendi Universal, S.A., 2002 Annual Report (Form 20-F) (June 30, 2003).

"VU 2003 20-F" for references to the Vivendi Universal, S.A., 2003 Annual Report (Form 20-F) (June 30, 2004).

A. Foreign Putative Class Members Could Sue and Are Suing Vivendi Outside the U.S.

There is no dispute that French shareholders could sue Vivendi in France on essentially the same allegations that are in issue here. See Opp. Br. 16-17; see also Mourre ¶ 148; C-DLP ¶¶ 2-3. France's highest court recently confirmed a shareholder's right to file a legal claim in France against a publicly-traded company for the misleading disclosure of material information. See Cass.com., Nov. 22, 2005, Société Eurodirect Mktg. (C-DLP ¶ 3, Ex. A). And three such actions have already been brought against Vivendi. See Opp. Br. 17.[1] With a 10-year statute of limitations (Carcassonne ¶ 32), more suits remain possible in France. English, Austrian and German investors are also able to sue Vivendi in their home countries. (See Rabinowitz ¶¶ 19-24; Herbst 736-42; Wegen ¶¶ 5-6.)

Given the existing French lawsuits, and the ongoing threat of additional litigation against Vivendi in Europe, this Court is required to determine, in framing an appropriate class definition, whether any judgment it enters will be enforced abroad. As we demonstrate below, because any such judgment will not be enforced abroad, only a domestic class should be certified here.

B. A Judgment by This Court Will Not Be Given Preclusive Effect in Europe.

Thirty years ago, in Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975), the Second Circuit concluded that it was a "near certainty" that the legal systems of France, England and Germany (among others) would not hold their citizens bound by a decision rendered by an

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[1] One of those actions, the Pasturaud matter, was recently dismissed – without prejudice – because of plaintiffs' failure properly to register the complaint. That defect can still be cured.

American court. On the record presented here, there is no reason to depart from the Second Circuit's conclusion – a conclusion on a "question of law". See Fed. R. Civ. P. 44.1.

The declarations of Vivendi's experts make clear that nothing has changed since Bersch, and it is as certain as a legal conclusion can be that the legal systems of France, England, Germany and Austria will not recognize or enforce against their citizens any judgment or settlement in a U.S. class action such as this.[2]

Plaintiffs' experts point to no changes in prevailing law in the last thirty years that would cast doubt on Judge Friendly's decision in Bersch. The most plaintiffs assert is that there are "no controlling precedents on point in any of the foreign countries considered". Reply Br. 6. Based on that assertion, plaintiffs' experts proceed to offer only arguments and policy justifications for why foreign courts might choose to depart from the current law. Thus, plaintiffs' experts speculate about: "another response under French law [that] is possible and seems to be preferable" (GT ¶ 49); what would be "reasonable and fair" (Smit ¶ 11); what is "far from bold to predict" (Smit ¶ 82); what "arguments . . . do not appear to be convincing" (GT ¶ 38); what constitute "reasonable grounds to believe" (GT ¶ 20); what are "reasonable grounds for finding" (GT ¶ 34); and what a foreign court "could well conclude" (GT ¶¶ 50, 53). At the extreme, plaintiffs concede that Austrian law is clear that a judgment of this Court will not be recognized and enforced in Austria (Specht ¶¶ 23-24), before contending that that settled law is somehow unconstitutional and might, hypothetically, be overturned (id.). None of that is sufficient.

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[2] See Audit ¶¶ 35-47; Carcassonne ¶¶ 34-36; Cohen ¶¶ 17, 25; de La Pradelle ¶¶ 138-39; Renard-Payen ¶¶ 23-32; Terré ¶¶ 47-60; Rabinowitz ¶¶ 25-47; Wegen ¶¶ 7-17; Herbst ¶¶ 36-42.

The only significant change in relevant law since Bersch is the revised Federal Rule 23, which now requires, in the notice to the class, that this Court explain the "binding effect of a class judgment on class members". Fed. R. Civ. P. 23(c)(2)(B). As explained below, there is no basis, however, for this Court to make such a representation to European citizens.

1. France.

Plaintiffs acknowledge that a "U.S. judgment would have no automatic res judicata effect in France, and that for the judgment to have such effect it needs to be either enforced or recognized by a French court" (Mourre ¶ 154), and that the *Cour de cassation's* decision in Munzer, Cass. civ. I, Jan. 7, 1964, sets forth the framework for analysis (id. ¶ 20). Munzer holds that for a French court to recognize a foreign judgment, the foreign court must (1) properly have jurisdiction under French law, and (2) have applied the appropriate law under French conflict-of-law principles, and the judgment (3) must not contravene French concepts of international public policy, or (4) be a result of *fraude à la loi* (evasion of the law) or forum-shopping. (C-DLP ¶ 5.) Vivendi's six French law experts agree that a judgment of this Court will fail all four conditions, and that "[i]t is certain that it will not be recognized or enforced in France". (Id. ¶¶ 4-21.)

First, pursuant to Article 15 of the French Civil Code, a French court has exclusive jurisdiction over a French defendant such as Vivendi, unless such jurisdiction is explicitly and unequivocally waived. (Audit ¶¶ 19-24; Cohen ¶ 25; de La Pradelle ¶¶ 22-24, 111-15; Renard-Payen ¶ 25; Terré ¶ 23-26; C-DLP ¶ 6; Mourre ¶ 29; GT ¶ 23.) In the absence of such a waiver, a French court will view this Court's assertion of jurisdiction over Vivendi as improper,

thereby precluding recognition in France of any judgment issued in the class action litigation.[3]

Plaintiffs' arguments that the protections of Article 15 have been waived by Vivendi and also by foreign members of the putative class (who are equally entitled under Article 15 to adjudicate their claims against a French defendant in a French court) are wrong. (See C-DLP ¶¶ 7-14.) Not only do plaintiffs concede that "Vivendi has not expressly waived Article 15" (GT ¶ 27), but Vivendi has acted affirmatively to preserve its rights under Article 15 by contesting this Court's subject matter jurisdiction (see Answer 52; 3/27/03 MTD 2-5; 11/21/03 MFR 4-9), and by incorporating Article 15 into its Answer by reference (see Answer 52; Hann. Ans. ¶ 263). As Professors Cohen and de La Pradelle confirm, that conduct is not a waiver of Article 15 under French law. (C-DLP ¶ 9 & n.5.) In the case of Vivendi's foreign shareholders, plaintiffs do not argue that a waiver has already occurred – only that it might occur in the future, if foreign shareholders fail to opt out of the U.S. class action, following publication notice. (Mourre ¶¶ 64-73; GT ¶¶ 49-53.) That, however, would also be insufficient under French law. (C-DLP ¶¶ 13-14.) Consequently, a putative member of the proposed class who resides in France will be able to use his jurisdictional rights under Article 15 to block any attempt at having a decision of this Court apply to him or her.[4]

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[3] Plaintiffs' declarants criticize Article 15, but are forced to concede that it remains good law in France. (Mourre ¶ 34 ("the French Supreme court still considers that Article 15 . . . is a valid defense to recognition of a foreign judgment"), ¶¶ 35-36; Smit ¶ 81-82; see also C-DLP ¶ 8.)

[4] EC Council Regulation 44/2001, 2001 O.J. (L 12) 1, does not change that result. (Mourre ¶¶ 59-62; Smit ¶ 81; GT ¶ 41.) That regulation nullifies exclusive jurisdiction provisions contained in the domestic laws of EC Member States only as they may apply to lawsuits commenced in other Member States. As one of plaintiffs' declarants effectively concedes, it has no effect in the case of a lawsuit filed against a French

Second, this Court's application of U.S. law here is improper under French choice-of-law principles. (Audit ¶¶ 25-26; Cohen ¶¶ 18-21; Terré ¶¶ 27-31; C-DLP ¶¶ 15-16.) The *Cour de cassation* has ruled specifically that if a company's registered office is located in France (as it is for Vivendi), then any legal action against that company brought by shareholders must be conducted according to French law. (Cohen ¶ 20; C-DLP ¶ 16.) The Court has also rejected the argument advanced by plaintiffs, that this condition can be satisfied if the foreign law applied by the foreign court is "equivalent" to French law. (Mourre ¶¶ 146-50; Smit ¶ 87.)

Third, a class action judgment issued by this Court will offend French concepts of public policy, and therefore would not be recognized in France. (Audit ¶¶ 27-34; de La Pradelle ¶¶ 35-71; Renard-Payen ¶¶ 14-18, 21-23; Terré ¶¶ 32-44; C-DLP ¶¶ 17-20.) France does not currently recognize a U.S.-style "class action", not least because it views publication notice (in all but very limited circumstances)[5] and use of the "opt out" mechanism established by Rule 23 as contrary to French public policy. (C-DLP ¶¶ 18-20.) Under French law, as plaintiffs concede, even where collective actions are permitted, each represented party needs to be individually informed of the action. (Mourre ¶ 111; C-DLP ¶ 19.)[6] An inter-government working group created by the

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defendant in a non-Member State, such as the U.S. (GT ¶ 43 n.3 ("One could therefore argue that the exclusion of rules of exorbitant jurisdiction applies only within an intra community relationship, and not where the courts of a non-member State are at stake."); C-DLP ¶ 12.)

[5] Plaintiffs' analogy to the permissibility of publication notice for corporate shareholders meetings is inapposite. (Mourre ¶ 112; GT ¶ 49; Smit ¶ 62.) Use of publication notice in such circumstances is specifically authorized by French law, unlike here. (C-DLP ¶ 14.)

[6] In Decision No. 89-257 DC of July 25, 1989, the *Conseil constitutionnel* (Constitutional Council) held that a union can pursue claims of its members, but only "subject to the condition that the interested party has been able to give his fully-informed consent and that he may retain the freedom to personally conduct the defense of his interests and to

President of France to explore the possibility of class actions reiterated France's public policy views in its December 2005 report, noting that: (a) "[a]t present there is no provision in our law adapted to the treatment of damages in a small amount suffered by a large number of victims, particularly when these damages are homogenous" (Fr. Govt. Rpt. 28); (b) "an appeal to consumers to join a collective action, issued prior to the rendering of a judicial decision, should not be made by means of a public televised or radiophonic appeal, by means of the posting of bills or tracts, or by the Internet" (id. 40); and (c) "[c]onsistent with the near unanimity of legal doctrine, [including] jurisprudence from the Constitutional Council, the personal freedom to appear in judicial proceedings prohibits the opt-out in French law" (id. 32). Consequently, a Rule 23 opt-out class action is incompatible with French law and policy.

Fourth, a French court will conclude that plaintiffs engaged in improper forum shopping by bringing this action in the United States. (C-DLP ¶¶ 21.) Plaintiffs ignore reality – namely, that Vivendi is a French company, principally owned by French shareholders, whose shares trade on the Paris Bourse (Bisiaux ¶¶ 2-7) – in asserting that a French court would deem the existence of some ADS purchasers in the U.S. a sufficient nexus for the assertion of U.S. law over all claims by all shareholders. That is simply wrong. (C-DLP ¶ 21.)

Finally, plaintiffs' contention that if this case is settled, Vivendi can avoid the risk of being sued again by conditioning payment on execution of a release is inapposite. (Mourre ¶ 160; Smit ¶ 20.) The point of an opt-out class action under Rule 23, however, is that the result binds the

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terminate that action". (C-DLP ¶ 19, Ex. E.) In order to bring such an action the union must show that each member received an individual letter containing all necessary information concerning the action instituted and his or her right to terminate the action at any time. (Id.)

class despite any individual's lack of action. That is equally the case should Vivendi win the litigation. For a release to have effect under French law, a French judge must conclude that the settlement included a valid waiver of the individual's right to bring an action. Here, given the public policy concerns discussed above, that will not happen. (C-DLP ¶¶ 22-23.)

2. Other Countries.

It is also clear that foreign members of the proposed class in Germany and England will not be bound by a decision of this Court. (Wegen ¶¶ 7-17; Rabinowitz ¶¶ 25-47.) (Plaintiffs concede this point for Austria. See supra at 2.)

Plaintiffs contend that under German law, any form of notice that generates actual knowledge should be sufficient to bind foreign members of the proposed class, so long as it satisfies the notice requirements of Rule 23 and is "not demonstrably inadequate as a matter of due process". (Mankowski ¶ 49.) Professor Wegen has demonstrated, however, that a foreign member of the proposed class who resides in Germany will be bound by a decision of this Court only if he receives notice in accordance with the service requirements of the Hague Convention. (Wegen ¶¶ 7-17.) Otherwise, there will be no enforceability in Germany.

The leading text on the subject of res judicata under English law, The Doctrine of Res Judicata (George Spencer-Bower et al., (3d ed. 1996)), states that the "judicial tribunal pronouncing the decisions must have had jurisdiction over the cause and the parties". (Emphasis added.) A person who institutes litigation in a jurisdiction by so doing voluntarily submits to that jurisdiction. See, e.g., A.V. Dicey & J.H.C. Morris, The Conflict of Laws 11-107 (13th ed. 2000). In an opt-out class action, however, absent members of the class do not institute litigation. The only authority in English law that deals with the question of res judicata and the jurisdictional

competence of a foreign court over individuals who were nominally plaintiffs in a class action, without express consent, makes it clear that the rules of jurisdictional competence apply equally to plaintiffs as to defendants. See Campos v. Ky. & Ind. Terminal Ry., [1962] 2 Lloyd's Rep. 459 (Q.B.) (discussed at Rabinowitz ¶ 44).

3. Plaintiffs' Citations Are Inapposite.

Plaintiffs contend that "[n]umerous courts have certified classes in federal securities cases that include non-U.S. purchasers". Reply Br. 6. None have done so, however, on the record presented here. And none could detract from the binding precedent of Bersch.

Vivendi previously addressed six of the ten cases cited by plaintiffs. See Opp. Br. 10-13. The other four do not alter the law applicable here. First, in Frietsch v. Refco, Inc., In re Cable & Wireless, PLC and In re Royal Dutch/Shell, defendants' experts did not state that it was a "near certainty" that a judgment would not be enforced overseas.[7] Second, the court in In re U.S. Fin. Sec. Litig., 69 F.R.D. 24, 49 (S.D. Cal. 1975), did not follow Bersch and recognized that a decision for the defendant "technically might not be res judicata against a [plaintiff] who took no affirmative steps in this action". Third, the quote plaintiffs attribute to the court in Royal Dutch/Shell, at page nine of their reply brief, is not

[7] See Frietsch v. Refco, Inc., No. 92C6844, 1994 U.S. Dist. LEXIS 312, at *28 (N.D. Ill. Jan. 12, 1994) (holding that defendant's expert "goes no further that to state that a judgment in defendant's favor would 'most likely' not be given res judicata effect"); In re Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 766 (E.D. Va. 2004) (holding that "[t]he possibility of an English court failing to give res judicata to a judgment of this Court is not a near certainty. Defendants themselves contend that it is only a mere possibility."); In re Royal Dutch/Shell Transp. Sec. Litig., 380 F. Supp. 2d 509, 547 (D.N.J. 2005) ("Defendants' experts do not conclude that there is a 'near certainty' that foreign courts will not enforce a U.S. judgment.").

the court's words, but rather the court's quotation of plaintiffs' brief in opposition to defendants' motion to dismiss (on subject matter jurisdiction grounds) – i.e., plaintiffs are quoting their own words. 380 F. Supp. 2d at 547.

Plaintiffs seem to argue that competing expert declarations are enough to allow for class certification. Reply Br. 8. That, however, is not the standard. This Court is required to determine what the foreign law of res judicata is. Fed. R. Civ. P. 44.1. We submit that the record presented offers no basis on which to depart from the reasoning and result in Bersch.

C. This Court Cannot Provide Foreign Members of the Putative Class with the Notice Required by Fed. R. Civ. P. 23(c)(2)(B).

Plaintiffs argue that there is no certainty one way or another as to what the res judicata impact of a judgment would be here and that the res judicata rules of four European countries are wholly unsettled. Reply Br. 6-7; Mourre ¶ 17; Mankowski ¶ 9; Smit ¶¶ 42-45; Harris ¶ 11. As implausible as that is, it also prevents compliance with Rule 23(c)(2)(B), which provides that notice "must concisely and clearly state in plain, easily understood language . . . the binding effect of a class judgment on class members under Rule 23(c)(3)". (Emphasis added.) If plaintiffs are wrong, then their proposed class violates Bersch. If they are right, then the Court cannot approve the notice demanded by Rule 23(c)(2)(B), and plaintiffs' motion should be denied. Opp. Br. 19-20.

D. Plaintiffs Fail to Show a "Single Worldwide Market" for Vivendi Securities.

Plaintiffs contend that North American purchasers of ADSs and European purchasers of Vivendi common shares can be grouped together in the same class because: (1) neither type of investor could have generated arbitrage

profits in the other market (Nettesheim ¶¶ 7, 12; Bhagat ¶¶ 5.1, 6.1, 6.11); and (2) prices and returns were not statistically different if measured using data from the two hours a day that trading on the two markets overlapped (Nettesheim ¶¶ 8, 13-17) or by comparing averages month-to-month (Bhagat ¶ 7.3.1.1). That is an oversimplification. First, plaintiffs' singular focus on the "no arbitrage condition" fails to account for significant news releases and price changes that occurred during the many hours when one exchange is open and the other is closed. (Gompers I ¶¶ 18-25, 31, 37, 41-44; Gompers II ¶¶ 13-15.) It also ignores the W-shaped pattern of intraday trading volume and volatility, which demonstrates that investors themselves viewed their transaction opportunities in terms of home markets, rather than as a single worldwide market. (Gompers II ¶¶ 14-15.) Second, plaintiffs gloss over realities that cause ADS investors and common share investors to be differently situated. ADS investors and common share investors experienced different trading opportunities and different risks and returns. (Gompers I ¶¶ 18-25; Gompers II ¶¶ 16, 20-24.) Plaintiffs' own data demonstrate that, over the length of the proposed class period, there is a 13% discrepancy in the returns for ADSs versus common shares. (Gompers II ¶ 22; Bhagat ¶ 7.3.1.1.) The two groups of investors, therefore, cannot be lumped together, as plaintiffs propose. Each group of investors confronts questions about reliance and damages that are specific to that particular group, and which in no way turn on assertions of market efficiency.

E. The Proposed Class Representatives: Capital Invest and Bruce Doniger.

Capital Invest: Capital Invest does not have standing to sue, and the declaration of Messrs. Böhm and Ungerböck does not change that. Messrs. Böhm and Ungerböck, who purport to speak on behalf of the sole investor in that Fund, APK, "confirm that APK has duly authorized Capital Invest to act in this on behalf of the Fund and/or APK". (B-U ¶¶ 3-

5.) That declaration is beside the point because they cannot and do not contend that Capital Invest possessed unfettered decision making authority with respect to the Fund, which is necessary to establish standing under eSpeed. See In re eSpeed, Inc. Sec. Litig., No. 05 Civ. 2091(SAS), 2005 WL 1653933, at *1 (S.D.N.Y. July 13, 2005). In addition, Vivendi has repeatedly tried to take discovery concerning the relationships between APK, the Fund and Capital Invest. Capital Invest has failed, however, to provide any substantive information – including the agreement that governs the management of the Fund – or make witnesses from APK available for deposition.

Bruce Doniger: Mr. Doniger is inadequate to be a class representative in this action because of his close personal, financial and blood relationship with the Bronfmans. Though plaintiffs try to downplay this relationship (Reply Br. 22-23), the key facts are not in dispute:

Mr. Doniger is a second cousin to Edgar Bronfman, Sr. and Edgar Bronfman, Jr. who were both directors of Vivendi during the class period. (Doniger Dep. at 38:23-39:8 (Parr Ex. 25 at 11); VU 2001 20-F; VU 2002 20-F; VU 2003 20-F.) Mr. Doniger admits that he has a "personal relationship" with Edgar Bronfman, Sr. and his brother, Charles Bronfman, and has socialized with them at family gatherings. (Doniger Dep. at 20:3-21:17 (Parr Ex. 25 at 6).) Indeed, Mr. Doniger received the Seagram shares that he exchanged for Vivendi shares because he is the son of Beatrice Doniger, another member of the Bronfman family. (Id. at 101:15-19 (Parr Ex. 25 at 26).)

Mr. Doniger is the CEO of the J.E. & Z.B. Butler Foundation, which was endowed in part by another Bronfman, Zella Bronfman Butler. Dialog Web Records, Foundation Center Directory (2005) (Ex.

A hereto). Mr. Doniger earns substantial monies (about $150,000 in 2004) for his services to the Foundation. Form 990-PF (Ex. B hereto).

Given those close ties to the Bronfman family, Mr. Doniger cannot demonstrate that he will fairly and adequately act as a class representative for Vivendi shareholders.

Conclusion

For the foregoing reasons, Vivendi respectfully requests that the Court deny Plaintiffs' Substituted Motion for Class Certification.

February 6, 2006.

CRAVATH, SWAINE & MOORE LLP,

by /s/ Paul C. Saunders
Paul C. Saunders (PS-0587)
Daniel Slifkin (DS-0588)
Timothy G. Cameron (TC-4639)

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New York, NY 10019
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Attorneys for Vivendi Universal, S.A.

EXHIBIT A

DialogWeb™

1/9/1 DIALOG(R)File 26:Foundation Directory (c) 2005 Foundation Center. All rts. reserv. 00072001
ID No. BUTL007 EI No. 136082916
J. E. & Z. B. Butler Foundation, Inc.

825 3rd Ave., 40th Fl.
New York , NY 10022
Establishment Data: Established in 1958.
Donors: Zella B. Butler; Jack E. Butler
Foundation Type: Independent (IN)
Present Status: Active
Purpose and Activities: Giving primarily for social services, Jewish welfare, Israel, education, and health services.
Financial Data (Fiscal Date: 04/12/31)
Assets Amount: $100,664,210 AM
Expenditures: $5,498,254
Qualifying Distribution: $4,656,240
Total Giving: $4,252,679
Grants Amount: $4,252,679 **Number of Grants:** 69
Highest Grant: $300,000 **Lowest Grant:** $500
Average Grant: 25000-75000
Geographic Limitation: Giving primarily in New York, NY.
Limitation: Local (L)
States Funded: NY
Support Limitation: No grants to individuals.
Governing Body/Executive Staff:
Officers and Directors:* Ruth B. Pearson*, Co-Chair. and V.P.; Beatrice B. Doniger*, Co-Chair.; Bruce Doniger*, C.E.O. and Pres.; Carol Parrish*, V.P.; Patricia Goldman*, Secy.
Application Information: Contributes only to pre-selected organizations. No unsolicited applications accepted. Board meeting date(s): Apr., Sept., and Dec.

Descriptors: ; Arts/cultural programs; Education; Health associations; Human services; Family services; Jewish federated giving programs; Jewish agencies & temples; Israel
Subfile: FULL

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EXHIBIT B

BEST AVAILABLE COPY

J.E. & E.E. BUTLER FOUNDATION, INC. 13-6062914

FORM 990PF, PART VIII - LIST OF OFFICERS, DIRECTORS, AND TRUSTEES

NAME AND ADDRESS	TITLE AND TIME DEVOTED TO POSITION	COMPENSATION	CONTRIBUTIONS TO EMPLOYEE BENEFIT PLANS	EXPENSE ACCT AND OTHER ALLOWANCES
BEATRICE B. DOHIGER C/O J.E. & E.E. BUTLER FOUNDATION 625 THIRD AVENUE, 49TH FLOOR NEW YORK, NY 10022	DIR/CO-CHA AS NEEDED	NONE	NONE	NONE
BRUCE DOHIGER C/O J.E. & E.E. BUTLER FOUNDATION 625 THIRD AVENUE, 49TH FLOOR NEW YORK, NY 10022	DIR/PRES/C PART-TIME	150,000.	NONE	NONE
LEWIS CLARKE C/O J.E. & E.E. BUTLER FOUNDATION 625 THIRD AVENUE, 49TH FLOOR NEW YORK, NY 10022	TREAS/SECY AS NEEDED	NONE	NONE	NONE
RUTH B. PEARSON C/O J.E. & E.E. BUTLER FOUNDATION 625 THIRD AVENUE, 49TH FLOOR NEW YORK, NY 10022	CO-CHAIR/V AS NEEDED	NONE	NONE	NONE
CAROL HARRIS C/O J.E. & E.E. BUTLER FOUNDATION 625 THIRD AVENUE, 49TH FLOOR NEW YORK, NY 10022	VP/DIR/TRS PART-TIME	70,000.	NONE	NONE
PATRICIA GOLDROP C/O J.E. & E.E. BUTLER FOUNDATION 625 THIRD AVENUE, 49TH FLOOR NEW YORK, NY 10022	EXCU/DIR/P PART-TIME	125,000.	NONE	NONE
	GRAND TOTALS	345,000.	NONE	NONE

APPENDIX R

TRANSCRIPT OF ORAL ARGUMENT BEFORE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK JUDGE RICHARD J. HOLWELL CONCERNING PLAINTIFFS' SUBSTITUTED MOTION FOR CLASS CERTIFICATION, DATED JULY 18, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

IN RE VIVENDI UNIVERSAL S.A.

SECURITIES LITIGATION, 02 Civ. 5571 (RJH)

----------x

July 18, 2006
3:10 p.m.

Before:

HON. RICHARD J. HOLWELL,

District Judge

APPEARANCES

ABBEY GARDY LLP
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STEPHEN RODD

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BY: MICHAEL J. MALONE

SCHULTE ROTH & ZABEL LLP
Attorneys for Defendant Guillaume Hannezo
BY: MICHAEL E. SWARTZ

(In open court)

(Case called)

THE COURT: All right. This is a hearing on the class action motion.

Mr. Fredericks, who is going to address it for the plaintiffs?

MR. FREDERICKS: I will, your Honor.

Your Honor, during the course of argument, I think that there is just one expert declaration with exhibits that I might want to refer to. I think we have an extra copy. If it would be convenient, I will certainly hand it up to the Court.

THE COURT: That would be fine.

MR. FREDERICKS: Thank you.

Good morning, your Honor -- I guess I am corrected. It is afternoon.

THE COURT: It certainly is.

MR. FREDERICKS: I would like to start, I think, by just giving the Court a brief update on the procedural status of the case and where we have been since we were last here and where we are going. I think the last time we were here before your Honor was last April. At that time the class certification motion was technically pending, but some additional class representatives were substituted in, a briefing schedule was set for the submission of defendants' operation papers and plaintiffs' reply papers.

At that time the Court also appointed Magistrate Judge Pitman to supervise discovery. Since that time, I think that we've probably been in front of Judge Pitman close to a

dozen times. Vivendi has produced something like three and a half million pages of document. Plaintiffs have taken I believe on the order of 10 30(b)(6) depositions relating to various aspects of discovery.

The case continues to be, I'll simply say very hard fought. We continue to have many discovery disputes which bring us in front of Judge Pitman. Today we're here on a class certification, but I just wanted to set forth for the court that, although there's been a great deal of paper submitted on the class certification motion with expert declarations and extensive briefing and recent submissions of still additional declarations by foreign law experts, the case has been proceeding with I would say equal vigor on another front under the supervision of Magistrate Judge Pitman.

There are basically four issues here today.

First of all, Vivendi says that there are differences between purchasers of Vivendi ADS's who purchased Vivendi ADS's on the New York Stock Exchange and purchasers of Vivendi ordinary shares who purchased those shares on Bourse or exchanges in Paris, London, Germany, the Netherlands, and elsewhere.

Their argument is basically that somehow the differences between ordinary shares and ADS's or ordinary share purchasers and ADS purchasers are so different that you need to have separate classes or subclasses.

Second, Vivendi says foreign purchasers who purchased ordinary shares overseas should be excluded from any class, and they rely on the Bersch near certainty test argument predominantly because they argue that a judgment given in this court will not be granted res judicata effect overseas.

Third, Vivendi says that the Court should exclude certain potential members on the grounds that those class members suffered no damages, even though at this stage of

the proceedings no expert discovery has been taken on damages.

And, finally, Vivendi argues that the six proposed class representatives all have various defects which render them inadequate.

I will address each of these arguments in turn. It is probably appropriate to start with the basic requirements for class certification under Rule 23.

I am sure this Court is very familiar with them, so I don't want to spend a great deal of time. We want to certify a class under Rule 23(a) and Rule 23(b)(3), two sets of requirements.

Under Rule 23(a) you have to meet the requirements of numerosity. There's no dispute about numerosity here.

You have to establish commonality under Rule 23(a). Courts make clear that commonality is always met in securities fraud cases. It is a very light burden. I don't think defendants really seriously contest that.

The third prong is typicality. Here I think there is an issue because defendants say that, for example, purchasers of Vivendi ordinary shares in Europe are not sufficiently typical of members of the class who might have purchased Vivendi ADS's in the United States.

I will address this argument in some depth. I think the touchstone here on the typicality argument, your Honor, is that "typical" does not mean "identical."

The case law cannot be clearer in that regard. Typicality is not defeated by minor variations in the fact patterns of individual class members' claims, and typicality is almost always found to be satisfied, as the Second Circuit put it in Drexel Burnham, if the claims arise from the same course of

events and each class member makes similar legal arguments to prove defendants' liability.

In this case, as your Honor is aware, plaintiffs allege that Vivendi and its senior officers engaged in a course of conduct from October 2000 through August 2002 to fraudulently misrepresent the performance and operations and condition of Vivendi.

There was a common course of conduct. It took many forms. There were many manipulations that we believe occurred that were developing in discovery. There's a common course of conduct during a two-year period. The typicality requirement is clearly going to be met in this case we would submit.

Finally, the only other prong that I will mention now is Rule 23(b)(3), which requires that plaintiffs show the common questions of law and fact must predominate. That requirement again, we would submit, is clearly met here.

Finally, something that Vivendi does dispute, 23(b)(3) requires a showing that the class action is superior to other available methods for fair and efficient adjudication of the controversy.

Here Vivendi's argument is really under Rule 23(b)(3) that the class action here is not superior because it allegedly will not be recognized overseas and certain claims should be pursued overseas.

THE COURT: Do plaintiffs concede that Bersch is the litmus test?

MR. FREDERICKS: Your Honor, Bersch has dictum which I think is useful, but meeting the near certainty test under Bersch is certainly not dispositive, as the decisions of Judge Cote in the Kromer Finance case and the decisions of

Judge Sweet i[illegible] In Re Lloyd's case recent decisions from this district make clear.

We believe that we meet the Bersch near certainty -- or put it this way, we believe that we have shown with our expert affidavits on foreign law that defendants cannot establish that there is a near certainty under the law of any European state that this Court's judgment in this case would not be recognized.

So it is a test which in effect defendants have to show. They have to show there is a near certainty that this Court's judgment would not be recognized overseas, that threshold requirement they have to meet to even be in the ball game.

We don't think they even prevail on that front based on the competing affidavits. Even if they were, however, to prevail on that argument, that would not suffice.

For example, in the Lloyd's case, Judge Sweet had no opposing affidavits submitted by the plaintiffs but nonetheless went ahead and certified the class despite possible concerns about res judicata, finding that they were really quite hypothetical, and the Court could otherwise fashion relief and procedures to minimize the types of concerns the defendants were raising.

THE COURT: It is safe to say, isn't it, that there's been no class certified that mirrors what you are seeking to do here in terms of the size of the foreign purchaser aspect of the class?

MR. FREDERICKS: No, your Honor. That is not correct.

THE COURT: The biggest class that I have seen where it's been raised at least in a litigation context is Daimler Chrysler. I suppose there's a similar class floating around in the settlement context in Ahold.

MR. FREDERICKS: Your Honor, the Ahold class has been certified. In fact, I think it's very interesting that the class certification motion had been fully briefed with dueling expert law affidavits.

And Judge Blake, who confirmed the settlement class, which included foreigners and domestic purchasers on equal footing alike, was quite clear, in fact, in rejecting the objections to the settlement.

An objector had come in and said, look, the foreign purchasers had unique defenses, there were subject matter issues. The structure of Ahold, the objector argued should have been weighted in a way so that U.S. purchasers got more of the results.

Judge Blake was very clear in saying, I appointed lead plaintiffs to represent the entire class. It would have been a breach of class counsel's fiduciary obligations and a breach of the court's expectations if they had treated the class members in a discriminatory manner. In fact, he characterized the objection as frivolous in rejecting it.

So I think that to say that this is the first case where such a settlement, where -- I'm sorry -- such a class would be certified is incorrect. In the litigated context, of course, the Kromer Finance case was again a securities fraud case in this district in front of Judge Cote and also certified.

Your Honor refers to the Daimler Chrysler case. I think that's very significant, because the Daimler Chrysler case is the only case that defendants can point to where there have been competing affidavits on foreign law and where the Court has said, you know I am not convinced that this judgment is going to get res judicata effect overseas and I am not going to certify the class, the only case that defendants can cite where there are duelling affidavits.

What's significant in that case is, first of all, the judge in that case, I believe it was a Maryland or Fourth Circuit --

THE COURT: Delaware.

MR. FREDERICKS: Yes, Delaware. Judge Farnan, excuse me, did not apply the near certainty standard. It looks as if he looked at the affidavits and said it looks as if under German law more likely than not there's a pretty good shot it is not going to be recognized, so I am not going to certify the class.

He did not apply the near certainty test which has been articulated by the Second Circuit and which is applicable in this courtroom.

Second, the only affidavit that was submitted -- there were competing affidavits on German law -- in that case was a ten-page affidavit on German law which Judge Farnan found most unpersuasive. I don't mean to suggest that the court needs to wade through every page of every expert declaration that has been submitted in this case.

THE COURT: You should have told that to my clerk before you submitted it.

MR. FREDERICKS: Well, that's why I'm raising it. I guess the court has the benefit of clerks.

I think there's no question, no question whatever in this case that the expert declarations submitted on both sides have been by competent, respected authorities on French, German, English, Dutch, and Austrian law. I think the only thing that can be said upon reviewing the analyses, and I'll speak only for plaintiff's experts -- I think each of our expert declarations is close to 50 pages; I know that one of our expert declarations has over 200 footnotes -- is that they are extraordinarily thorough, and our experts believe that res

judicata will be granted overseas in each of the foreign jurisdictions.

I would be happy to discuss those if the Court likes. The defendants' experts say, no, it's not. They say, because the magic words in Bersch require it, that there's a near certainty that there won't be enforcement overseas.

But I don't see how, where you have duelling experts of the quality that we had in this case anyone, your Honor, me, Mr. Saunders, any of the attorneys in this room, can say with certainty what any foreign court is going to do in terms of res judicata.

There is no controlling authority cited in any of the foreign law jurisdictions that any expert can point to. There's simply a lack of precedent.

I think it's very telling in this regard, and let me just use the example of French law as an example because defendants have spent a lot of time talking about French law. The primary argument that defendants relied on in saying that there was no way a French court would recognize a judgment in this case was, they said look at Article 15 under the French Civil Code, which provides for exclusive jurisdiction of the French court in cases brought for or against French citizens.

It's undisputed the French defendants are French. If there are French absent class members, they have a right, they said, under Article 15 to come in and have those claims heard in France, and under the French law of recognition of foreign judgments, that exclusive jurisdiction means that a French court is going to find that anything that this U.S. court does regarding a Frenchman is not going to be recognized.

We had responses to that argument -- there was a waiver of the privilege -- that certain EC conventions have superseded that. But I think something very telling occurred, and this was the subject of the recent submission of expert

declarations to your Honor just in the past week. Our expert declaration on French law expressly noted that the nationalistic, one might say chauvinistic principles of Article 15 in the French Code were universally condemned by French academics, that it was an archaic doctrine, and he predicted with some degree of certainty that that doctrine was going to fall by the wayside and in the Prieur decision.

THE COURT: But it's one thing to talk about a case in which you are talking about a divorce proceeding on two people who live in Switzerland as opposed to a case of this magnitude dealing with absent class members. It is a different kettle of fish.

MR. FREDERICKS: Your Honor, I would respectfully disagree.

In fact, I know that is what defendants' French law declaration says that was submitted to your Honor last Monday. We have a response to that declaration which we would like permission to file, because one of the things that the French experts of Vivendi say is -- they concede that their Article 15 argument is dead. That's conceded.

The French court has said Article 15 is now an optional basis of jurisdiction, not an exclusive basis of jurisdiction. I think there's no doubt that that holding is binding in all types of cases.

The publicity given to that case by the Supreme Court, it's gotten the maximum level of publicity in terms of being published in the official journal and elsewhere, the whole reason that case is published and has gotten such attention is because it's clearly a reversal of all of the Article 15 jurisprudence. I don't think any defendants' experts dispute that.

What defendants have argued is, well, now that Article 15 is gone, French law and French courts are going to

compensate by making the other requirements of recognizing a foreign judgment that much more stringent.

As our expert opines, and we would request permission to again file this brief reply to Vivendi's latest expert submission because Vivendi's expert submission does raise issues that we haven't had a chance to respond to. What our expert says is that's ridiculous. The law in France is clearly moving way from archaic and old doctrines that suppress recognition of foreign judgments. It makes no sense to believe that, having rolled away one doctrine, they are now going to strengthen another doctrine, particularly since the doctrine that defendants' experts say is going to be strengthened has been just as roundly condemned as Article 15. Mr. Audit, one of Vivendi's expert witnesses has written one of the prominent articles criticizing the notion of applying the choice of law criteria to bar recognition of foreign judgments. He now opines that that is what the French courts are going to adopt. I am not a French lawyer; Mr. Saunders is not a French lawyer.

I think the story of the Prieur decision is a pretty good indication that certainty in foreign law, particularly in an era where European countries, virtually all European countries, including France, including Germany, including Holland, including the United Kingdom, are all embracing to a much greater extent today group action and even considering U.S. style class actions --

THE COURT: I think it would be a stretch to conclude that the French at this juncture are embracing classes consisting of absent class members.

MR. FREDERICKS: Your Honor, the test --

THE COURT: I don't know that that's dispositive, but it's certainly an observation.

MR. FREDERICKS: I think that not only is it not dispositive, I think it's plainly not relevant. The test that the French courts will apply -- and again we are talking only about France, and I want to make some observations about other foreign jurisdictions in a moment.

Any time you have recognition of a foreign judgment, the state in which recognition is sought is going to have procedures that are different from the state, in this case the United States, where the judgment is entered.

Differences in procedure between French courts and U.S. courts, between British courts and the U.S. courts, between German courts and the U.S. courts, procedural differences almost never rise to a level of violation of public policy or natural justice concerns so as to defeat recognition of a foreign judgment.

I'll tell you one simple reason why. Because if every court expected foreign courts to apply their own home court's procedures, you would never have any foreign judgment recognized, because every court is inherently going to apply different procedures.

So the test -- and I think this is really fundamentally important if you read the declaration and you look at the law cited -- is, is there under the laws of these different countries something so abhorrent about the class action device in the United States that it violates principles of natural justice or public policy so that a European court would not recognize it?

I think that it is pretty clear as a matter of common sense that in Europe where, as all of our expert declarations show, there are already mechanisms for representative actions in different forums, when the dynamic is towards greater rather than lesser use of group action devices, to suggest that a Court will strike, will refuse to recognize a U.S. judgment on that grounds and that there's a near

certainty that it will, there is no support for it in any precedent on point.

I think if you look at the kinds of cases -- I mean, I don't mean to paraphrase, but, for example, I think that if you had a judgment which provided a civil remedy of chopping off a hand for stealing a loaf of bread, I think it's probably going to be very hard to enforce that kind of judgment in any European court.

THE COURT: From defendants' perspective what you are talking about is barring an action with respect to an individual who arguably has not received, certainly has not received individual notice and is not a party to a proceeding. Some European legal authorities might not view that with the same fervor that American legal authorities do.

MR. FREDERICKS: Your Honor, I think you posed the question perhaps inadvertently well, which is some European authorities may --

THE COURT: I will ignore that comment.

MR. FREDERICKS: We would simply say, as an addendum to your statement, that some European authorities will not find that to be a problem. We're dealing with a near certainty test. Let me give you a direct example of that on point.

THE COURT: Put aside the near certainty test for a second.

MR. FREDERICKS: Sure.

THE COURT: Let's assume that that's not dispositive.

What about the simple issues of manageability and notice involving 20 other purchasers in 20 other countries on

20 other foreign exchanges and the issue of whether or not a U.S. court should take on that burden.

Somebody in Liechtenstein undoubtedly has a cause of action in Liechtenstein for fraud. Why shouldn't they simply pursue it there?

MR. FREDERICKS: Your Honor, may I just add one further comment before we move away from the other foreign law issues.

French law has been the subject of a great deal of attention in this case, particularly because I think Vivendi submitted five expert declarations on French law.

Based on our understanding probably less than half of Vivendi ordinary shares overall traded in Paris, maybe it's about half. A very substantial block of these shares traded in London in particular.

I think even defendants would probably agree that the recognition of foreign judgments is much easier in England. I have been focusing on France because France has a little more bells and whistles to their recognition law. But I don't want the Court to feel that this is just about French law.

I think that we address all the concerns under French law. In fact, I think we show that the right choice of law, the choice of law requirement would be satisfied, the Article 15 requirement we would have satisfied anyway, even before the Prieur decision.

There's no fraud here in terms of selection. We affirmatively believe that this judgment or any judgment entered by this court will be enforced overseas. No side has precedent to show one way or the other. I think the near certainty test puts an almost insuperable burden on defendants.

That burden has never been met in a case where there have been duelling affidavits. This would be the first court which applied the near certainty test in a way that was favorable to defendants on this kind of record. It would be parting company from the prior precedents in this case.

Let me turn now to your questions about superiority because I think that those are worthwhile points to address.

First of all, as a threshold matter, I think that U.S. courts should be skeptical when defendants seek to prove that a class action in the U.S. is inferior to other options that defendants prefer.

The notice question has been addressed in an affidavit. I won't be quoting from it, but this submission by Todd Hillsey of Hillsoft Notifications, he has done the notice program in Ahold. He has been involved in the notice program in many other cases where worldwide classes have been certified. He has done notice in 53 countries, in 36 foreign languages.

THE COURT: Do plaintiffs have an estimate as to what percentage of the proposed class would receive direct notice, actual direct notice as opposed to notice by publication?

MR. FREDERICKS: Your Honor, Mr. Hillsey advises me, and I believe this is in his declaration, that his or his affiliated firms have a database of I think some 5,000 institutional investors and brokers.

This is not a class of holders. It is a class of transactors, people who purchased Vivendi's ADS's or ordinary shares during the class period. It does not go into the Paris Bourse or the New York Stock Exchange and say here are my shares, can I trade them for $5.00. The trades are entered into computers. They are kept in brokerage records. They are also kept in the central clearing repository that is cited in one of

the declarations submitted by Vivendi. I think it goes by the abbreviations of TPI.

But I think that is just a central clearing house, and it's by no means the only source of records. I think that notice in this case will proceed in a way that's very familiar to anyone who has done notice in a U.S. case.

Notice goes out to nominee holders, to brokerage firms. Certainly it will not be hard to identify institutional investors, who probably account for a very large percentage of the shares traded. There will be no doubt about getting individual notice, though some of them are identified in SEC form 20(f) filings and some of them are identified elsewhere.

Vivendi makes the point, and it's a very clever point. They say, under French law, we, Vivendi, do not have access to records about shareholders who hold shares in bearer form.

I don't dispute that. However, to effectuate actual notice, individualized notice, we don't need to get names from Vivendi. We don't need to breach the anonymity of Vivendi. We can provide notice through the other intermediaries that have that information and convey the notice just as Merrill Lynch and Bear Stearns are asked to provide information every day in class actions to their nominee holders.

IBM may not know who all those holders are that Bear Stearns has in street name, but Bear Stearns is going to have them. There may be some shareholders who cannot be reached. That I think happens in every class action.

But the notice program that we contemplate is going to be good old due process, Rule 23 kind of notice reasonably calculated to provide the best notice practicable.

Unlike Bersch, we now live in an age of the Internet. We can get postings on Vivendi's website. We can have a

court-authorized website where people from all over the world can log on to a website to get information about the suit.

There will be publication notice. There will be media notice. I am sure that this case could potentially attract a lot of media attention in the financial press. The answer to your Honor's question about notice, which I think is a very sound thing to be raising in the Rule 23 context, is I think we've got one of the world's best most experienced notice administrators to do this.

This is a firm that will have had substantial experience already based on the Royal Ahold case, a case very comparable to this one in many respects.

We will supplement individual notice with publication notice, Internet notice, notice through Vivendi's own web channels. I think it's important to note that there is precedent such as the U.S. Financial case, which is cited in our brief, in which there was an argument, well, 42 percent of the shareholders in this case won't get individual notice. The judge said, you know what, that's too bad. You know, we're still going to get very hefty penetration.

The fact that you can't notify everyone has never been a ground for refusing to certify a class, and defendants don't cite a single case in which concerns about notice have caused a court not to certify a class.

So, again, if there is any precedent out there, we haven't seen it. We aren't aware of it. I think we live in a modern age, brokerage firm records, Internet access, people are going to be aware.

Virtually all institutional investors, I don't think there is going to be any question they are going to get individual notice, and that program will be supplemented with a program, free media, paid media, advertisements, etc.

I don't know how many other specific questions the Court has. There are many other things I could cover.

THE COURT: I think I would like to hear from defendants at this juncture.

MR. FREDERICKS: Very good.

MR. SAUNDERS: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. SAUNDERS: This is a very significant issue in a very significant case. If the court were to conclude foreign shareholders who purchased Vivendi stock on foreign stock exchanges are not properly included in the class, that will eliminate, by our calculation, somewhere between 85 percent and 95 percent of the damage claims.

It is a very significant issue even with respect to the ADS holders. If the class were limited to the ADS holders during the class period, a very significant percentage of the ADS's were held by the Brofman family, and they will be excluded from the class.

So this is a very, very significant issue. There has never been a case, so far as we are aware, in which a court certified a class that included so many foreign shareholders and in which the defendant was already subject to litigation in a foreign country by foreign shareholders raising the very same issues that are raised in this case.

The defendants in class actions don't get very much, but they do get one thing under our law. They get repose. Central to our notion of a class action and I think central to the constitutional due process requirements is the proposition that members of a class are bound by the result. They are bound by the result.

If they weren't, there would be significant and substantial due process problems in allowing the very same people to sue either in a represented capacity or --

THE COURT: Certainly that risk occurs in non-class-action cases all the time. This is a case where, at least at this juncture, there is a decision finding subject matter jurisdiction.

MR. SAUNDERS: Yes, your Honor.

THE COURT: So that the foreign purchasers, leaving aside the class action issue, are entitled to be in this court asserting these claims.

MR. SAUNDERS: Yes.

THE COURT: All right. That's just an observation.

MR. SAUNDERS: You're right, your Honor.

But in this case, because of the nature of the class action, they are not here directly. If they were here directly, it would be an entirely different issue. There is no issue with respect to the class representative. They're here.

They have said they will agree to be bound by the decision of this court, properly so.

However, the foreign purchasers who they purport to represent are not bound by decisions of this Court. In fact, the interests --

THE COURT: May not be bound --

MR. SAUNDERS: Or may not be bound.

THE COURT: -- outside of the United States.

MR. SAUNDERS: In our view they are not. In fact, the interests of the foreign shareholders are actually different from the interests of the class representatives in that very respect.

If we are correct about French law, if we are correct that the French courts will not recognize the preclusive effect of a judgment in this case, the following might occur: We might win this case, and in the United States ADS holders are absolutely precluded from suing us again for issues litigated in this case.

The French shareholders, who in our view are not precluded, but the French shareholders have an interest in trying to relitigate that case in France, as we think it would be their right, they haven't given up that right. They haven't waived that right. It would be in their interest to try to relitigate that case in France if the French law will permit them to do so.

THE COURT: That certainly is at least a theoretical risk. To the extent it is a practical risk remains to be seen.

MR. SAUNDERS: It remains to be seen, but consider the following, your Honor. The French statute of limitations is ten years. Your Honor knows that the French president has said that he wishes to change French law to incorporate some form of class action in France, although at least in the proposals that I have seen there would not be an opt-out class action. But he has said that he would like to try to incorporate some kind of a class action in France.

Consider the following: If we win in this case, with all of the lawyers who are aware of this and aware of these issues, it's at least probably more than just a theoretical possibility that some group of lawyers will try to put together some group of French shareholders to sue Vivendi again. There are already three actions pending against Vivendi in France.

As I said, given the long statute of limitations period in France, that is probably more than just a theoretical possibility. The due process problem for us, your Honor, is the following.

If we win in this, and if Mr. Weiss and if Mr. Fredericks turns out to be wrong, he said -- and I wrote his words down, we affirmatively believe that the judgment will be recognized abroad.

Great. If he's wrong about that, if he's wrong. We're subject to a second set of lawsuits in France that the whole due process nature of a class action in this country would preclude.

How do we get relief in that circumstance? Certainly not in the French courts. The French courts would say we don't recognize that judgment for a variety of reasons.

THE COURT: That is your argument.

MR. SAUNDERS: Right. Who do we go to?

THE COURT: If you agree that Bersch is used in the way I take it you read it, even under that decision, the near certainty standard is a demanding standard.

MR. SAUNDERS: It's the highest standard that I know of in the law, assuming that that standard itself meets the due process requirements. We've not challenged that standard in this case, and we, I believe, have met that standard.

It is the highest standard that I know of in the law. We have preponderance of the evidence, we have beyond a reasonable doubt, we have clear and convincing evidence in patent cases, and now we have a near certainty standard.

THE COURT: How can anybody ever meet a near certainty standard in a situation where -- how old is the Bersch decision?

MR. FREDERICKS: 1975, your Honor.

THE COURT: So you are going about 30 years, and, as far as I can tell, no foreign court has gotten within striking distance of this issue, that is, the enforceability of a class action decision against losing absent class members.

MR. SAUNDERS: There's never been anything remotely like this, your Honor. That is because most of these cases arise in a settlement context. In the settlement context both parties have an interest in having the judgment enforced as widely as possible. We are not in the settlement context.

This is a litigation context. There's never been a case remotely like this in which so many shareholders of the defendant corporation have lived abroad, have been foreign citizens who traded on foreign exchanges, and there's never been a litigated case in which this issue has ever come up abroad.

Our experts have said that they believe that to a near certainty the French courts would not recognize the preclusive effect of a judgment in this case. They've set forth in great detail the reasons why they believe that.

It is worth noting that one of those experts is a former judge of the Court of Cassation. These are not experts whose opinions should be taken lightly.

THE COURT: The pedigree of the experts on both sides is beyond complaint.

MR. SAUNDERS: I agree with that, your Honor, on both sides.

But the issue is really, assuming that the near certainty standard meets due process requirements, and I don't take issue with that here, if we have not met that standard in this case, then I respectfully submit that that standard is illusory, that it could never be met, that it's not a standard that means anything because we have, when I've looked at the records in all of the other cases, I've looked at the submissions in all of the other cases where this issue has come up, nobody has come remotely close to the kind of submissions that we have made in this case.

I think that if the standard is the right standard, it is still the law in the Second Circuit, French law is, foreign law is now to be decided as a matter of law. When I first started practicing, it was a matter of fact, but now it's a matter of law. That is the law of this circuit.

There are two cases in this district, one is a decision by Judge Cote and one is a decision by Judge Sweet, that in my view do not accurately set forth the law.

THE COURT: They misinterpret Bersch in your view?

MR. SAUNDERS: I beg your pardon.

THE COURT: They misinterpret Bersch?

MR. SAUNDERS: I believe they misinterpret Bersch. They articulate a standard that is not in Bersch. The standard they articulate is that the judgment in this court might have some value to a foreign court, and a foreign court might be interested to see what a judge in the United States said in order to help the foreign court decide what to do with a case pending in that jurisdiction. That is not the Bersch test. There is no basis for believing that a foreign court would believe that a judgment of this court would have any value. We have set forth the reason why we believe foreign courts would not recognize judgments in this case.

THE COURT: I'll still of two minds as to whether Bersch and the near certainty language in it addresses class action issues as opposed to pendent jurisdiction issues.

It's very difficult to parse Judge Friendly's language, and I read the cases again this morning and came away wondering whether or not this isn't really a pendent jurisdiction issue as Judge Friendly was approaching it.

MR. SAUNDERS: I believe it is a pendent jurisdiction issue. I don't think there's any question about that. But it was a pendent jurisdiction issue in a class action context. So to that extent it is a little bit difficult to get through, because what Judge Friendly is doing is applying the discretion test to decide whether a pendent jurisdiction case ought to be accepted in the federal court.

THE COURT: And decides that it would be an abuse of discretion to exercise pendent jurisdiction.

MR. SAUNDERS: Precisely because the judgment in the class action, it was a pendent jurisdiction with an overlay of class action on top of it, precisely because in the class action context the judgment would not be enforced in a foreign jurisdiction. So your Honor is correct. It's pendent jurisdiction case, but it's a class action case.

THE COURT: Well, he certainly doesn't elucidate on how you marry the jurisdictional due process issues to 23(b)(3).

MR. SAUNDERS: He really doesn't address that issue directly. But if I could just finish on the decisions by Judge Cote and Judge Sweet, they say that the judgment might have some value and that that is all that is required to certify a class that includes foreign shareholders.

I respectfully submit that is also not correct.

THE COURT: Maybe not Judge Sweet, but Judge Cote also goes on to say that some say yes and some say no so it wouldn't be a near certainty.

MR. SAUNDERS: She does say that. And she also says that the foreign court, the court could fashion a proof of claim that would assist --

THE COURT: Which is true in a settlement context.

MR. SAUNDERS: Precisely. That was going to be my point. It's true in the settlement context, but it's not true in this context because as a defendant we are entitled to have the preclusion apply, and this is important, to foreign shareholders who do not submit proofs of claim.

THE COURT: Your risk, one could argue theoretically, is with respect to your enforcing a favorable jury verdict or judge verdict, decision, against people who at the time the judgment had entered had not yet sued.

MR. SAUNDERS: Right.

THE COURT: Because presumably I could simply certify a class that carved out anybody who now or up to the judgment has filed a suit in a foreign jurisdiction. What you are talking about --

MR. SAUNDERS: Exactly.

THE COURT: -- is people who want a second bite.

MR. SAUNDERS: People who know nothing about this case, people who do not receive actual notice, people who did not opt out, people who just come into a French court and say I want to sue again or I want to sue.

THE COURT: And whether that results in the plaintiff's inability to establish a superiority prong of the test.

MR. SAUNDERS: Precisely, your Honor. If I might just say a word about manageability and notice. Again, your Honor, I think this is important. We pointed out in our papers that Rule 23 requires that the notice be given in clear -- let me just get the exact language, your Honor.

I was going to paraphrase it, but I don't want to paraphrase it. I want to give you the exact language. The notice must concisely and clearly state in plain, easily understood language the binding effect of a class judgment on class members.

That is required. Your Honor can't change that rule. Rule 1 of the federal rules says you can't make rules that are inconsistent with Rule 23. That's the rule. The notice must state in clear -- concisely and clearly state in plain, easily understood language the binding effect of a class judgment.

THE COURT: So what was the language used in Ahold?

MR. SAUNDERS: The language in Ahold was that you are bound by the judgment.

THE COURT: Period or under U.S. law?

MR. SAUNDERS: The language in the Ahold notice that I saw simply said you are bound by the judgment. I have a word to say about Ahold in a minute. But with respect to this, when we pointed out in our papers that the plaintiffs could not comply with that part of Rule 23 because their own experts have said they don't know, they can't tell one way or the other, it may be enforceable, it may not be, we heard something different from Mr. Fredericks today, but that's what the plaintiffs' experts say.

In their reply brief, footnote 10, page 14, they said you can solve that problem by writing a notice that says you will be precluded in the United States and the judgment may --

I'm quoting -- may bar pursuit claims abroad. "May" not "will."

That's what the plaintiffs have said you could put into the notice.

Now consider the following. Notice is given in 24 languages, published in 24 newspapers all around the world. The notice says, just like every other notice I've ever seen, if you have any questions about this, call plaintiffs' counsel.

So the foreign shareholder sees this notice in the newspaper and calls Mr. Fredericks. He says, I see here on this notice that the judgment may bar pursuit of claims abroad.

What does Mr. Fredericks say? He says, well, as he said a moment ago, we affirmatively believe that the judgment will be recognized abroad. But that's not what his expert said. How does he respond to that question? Does he say, yes, you absolutely will be precluded? Does he say maybe yes, maybe no? I don't know?

How does that comply with due process in the Rule 23 context? Does he say it's in your interest, Mr. Foreign Shareholder, to try to sue again?

THE COURT: There is always an issue once you step into a foreign jurisdiction whether or not a U.S. judgment is going to be recognized, even if it's between two U.S. citizens.

So I am not sure that the notice that you and I have all seen and everyone here has seen throughout our careers addresses the issue of whether or not under the law of Poland when somebody goes in and attempts to execute on a U.S. judgment it's going to be enforced or not.

MR. SAUNDERS: Yes. Exactly. But that's a different situation from the situation I am talking about. I'm not talking about trying to execute on a judgment entered into between two parties who were present in court in the United States trying to execute on that judgment in a foreign jurisdiction.

I'm addressing the situation where a shareholder is trying to decide whether or not to opt out. He sees this notice in the newspaper which says you may be precluded and you may not be.

How does that shareholder know whether to opt out or not? He doesn't. There is no way he could know, and Mr. Fredericks can't answer it.

This would be repeated all around the world, the same thing. You can't give notice under those circumstances. Even if you could give notice by publication in France, which the French courts will not recognize, even if you could, you would have that manageability problem. It would be a nightmare.

At the end of the day, not Mr. Hillsey, not Mr. Fredericks, not Garden City Group, none of those people can give an accurate answer to the question, "what do you mean by this in the notice?"

THE COURT: Certainly some of their experts give an answer.

MR. SAUNDERS: They say they don't know. Their experts have all said, we can't tell, we don't know. It could be, it could not be.

THE COURT: Some of them I think are pretty definitive saying it will be.

MR. SAUNDERS: I don't think anybody says that categorically it will be. I think the most they say is that it should be because that's the way the world is moving, but I don't think any one of the experts say that absolutely categorically will be.

The most they say is this has never come up. We have never seen it. We don't really know one way or the other. I guess we know that in Austria, I guess there seems to be a concession that at least in Austria the plaintiffs' experts concede that it will not be recognized in Austria.

So with respect to manageability and notice, I think that there are basically two problems with respect to notice. One is meeting the requirements of Rule 23, our Rule 23.

The second issue is whether the foreign jurisdiction will recognize notice by publication. France, the Conseil Constitutionel in France has said pretty clearly that notice by publication is not recognized, not appropriate, that it's unconstitutional.

That came up, I think your Honor knows that there are two types of group actions that are recognized in France, one by the labor unions and one by copyright holders. Both of those group actions require actual notice to and actual consent by the members of the group to have somebody else sue on their behalf, and the Conseil Constitutionel has said notice by publication is unconstitutional.

So the second issue of notice is not so much compliance with Rule 23 but whether notice by publication of the type that is envisioned here would be considered yet one more basis by the French courts for not giving preclusive effect to a judgment in this case.

Your Honor, those were the principal issues that Mr. Fredericks addressed. I am perfectly happy to address any of the other issues that have been set forth in the pleadings,

especially with respect to the adequacy of some of the named plaintiffs. I think there are some significant issues about that which I'm prepared to address if you would like.

THE COURT: I don't think I need argument on those issues. Let me just hear briefly from Mr. Fredericks in reply on the superiority issue.

MR. SAUNDERS: Thank you, your Honor.

THE COURT: Thank you.

MR. FREDERICKS: Thank you, your Honor.

I think that as Mr. Saunders was going through his argument, the Court sua sponte I think raised a number of points that I would have wanted to make. I just want to reiterate some of them.

Sort of going in reverse order on the points Mr. Saunders raised in his argument, under Rule 23 that you must clearly state the binding effect of a class judgment, let me -- and he says that the kinds of scenarios that the court raised are totally different situations.

Let me posit this scenario, your Honor.

There is an action brought in the Southern District of New York based on fraudulent conduct by a United States multinational corporation with headquarters in New York and let's say offices in Paris.

The U.S. court certifies a class action. All the shares trade in the United States, so a global class is certified. But let's say there is a Frenchman who bought U.S. shares in France and he's in Paris.

Well, if Mr. Saunders' argument is to be believed, that Frenchman in Paris has the right to say, you know, I didn't

like that settlement in the Southern District of New York. That company has an office here in Paris. I'm going to sue again in Paris.

So I think your Honor is precisely correct in saying that in every case the U.S. court never has the ability to state with certainty what the res judicata effect is going to be overseas. You never know what a judge in Poland might do. But that never stops U.S. courts from exercising their jurisdiction over claims of purchasers of securities on the New York Stock Exchange.

So I think there that Mr. Saunders really raises a red herring. Certainly the notice can comply with Rule 23 by stating the binding effect will be clearly binding as to all claims that are being brought in the United States, and then it can state that it may well be binding overseas. That is the binding effect.

The amendment to Rule 23 does not by its terms state that courts can only certify classes that they can guarantee the binding effect overseas, worldwide under any and all circumstantials. I think that would be a gross misreading of the rule, and I think every day courts certify actions where there's always the hypothetical possibility that Mr. Saunders raises that an aggrieved overseas person may want to sue again overseas.

Now, another argument that Mr. Saunders made on the manageability point is, well, what happens when class members overseas get this notice, they have lots of questions, what happens?

In the Ahold case call centers were set up with 1-800 numbers. They were manned by persons who could speak different languages.

I'm not sure that foreigners are going to have that many more calls than Americans, nor frankly do I think that

Europeans are probably going to be any more or less puzzled by the res judicata language of the class notice than the average American citizen is. I think that it's wrong for this court to presume that Europeans are somehow more stupid or smarter than American shareholders.

If a notice is adequate to explain things to an American investor, there's no reason that notice can't be translated to be similarly effective to foreign shareholders.

Frankly, I think that, although Mr. Saunders says I can't possibly have a response to this, I think that the court -- I don't know whether the court can take judicial notice of it, but I will certainly represent that foreign institutions participate heavily in U.S. actions. Institutions and other investors overseas get notices of U.S. class actions.

To assume that they don't understand them or understand them less than Americans, if they get notice they will understand just as well as Americans what to do. If they have questions, procedures can be set up, either by having more detailed explanations on a website or call centers.

All these manageability concerns can really be dealt with in today's modern age. Maybe 30 years ago when Bersch was decided, I think we all remember 30 years ago international plane travel was exciting and the making of long distance phone call was prohibitively expensive. I think in a day and age when international phone cards can give you an international phone call at a two-cent rate, it's really not very hard to set up manageability procedures. I definitely want to address Mr. Saunders' arguments about due process and constitutionality.

I don't really understand his argument entirely because he didn't raise it in his opposition brief, he didn't raise it in his surreply brief. He's raising it now in argument, although in raising it at argument he says I agree that we aren't raising that issue.

Frankly, that issue isn't in front of the court, and even if it were, I think it is appropriate --

THE COURT: Certainly the issue is front and center in the Bersch decision.

MR. FREDERICKS: It is in a different context. But if the Court looks at the Lloyd decision, which, if the court will bear with me, Judge Sweet did in fact have something to say on this. Now I am going to, of course, not be able to find it. I bent down the page. I would just like to read what Judge Sweet said about this. I am not going to find it. But if the Court reads the Lloyd case, Judge Sweet looked at that issue and squarely rejected it, said defendants cite no authority and the Court is aware of no authority. I think that Judge Sweet had that exactly right.

Moreover, let's look at this as a matter of common sense. Again, as your Honor pointed out, whenever you have a judgment rendered in the United States, if there is an issue of getting it recognized abroad, there will frequently be issues. There is no constitutional right that any defendant has, or any plaintiff has for that matter, to get res judicata against the world. That simply doesn't happen.

But let me talk about what the balancing of interests is and get back to the Bersch case, because I think your Honor has raised some interesting questions about Bersch. Bersch was clearly in the context of pendent jurisdiction. The facts were very different.

That case involved I think an offering item in a registration statement. The offering was made to approximately 15,000 foreigners. The prospectus expressly said it was intended to be valid in the United States. Over 99 percent of the investors who got it were foreign. It was a fraud perpetrated by foreign defendants directed at foreign plaintiffs.

The Court in Bersch properly held there was no subject matter jurisdiction. So one thing we can say about Bersch, it's an early subject matter jurisdiction case. As your Honor is aware, the court in Bersch said, no subject matter jurisdiction in that case.

In that circumstance Judge Friendly properly held that it would really be kind of ridiculous to say that you could have a pendent common law fraud class when the pendent common law class would involve having to apply the laws of 14 different states, fraud rules, and the pendent class consisted of 14,000 investors and the U.S. securities class or the U.S. class only had 300 investors. So clearly you can't have anything pendent there to create a class.

But what I want to say about Bersch in this context, I think it's important and helpful for the jurisprudence and hopefully for the Court. I think what Judge Friendly was saying in articulating the near certainty test was, look, we don't want U.S. courts to exercise their scarce judicial resources adjudicating claims that really have nothing to do with the United States, fraud by foreigners against foreigners. The prospectus even said nothing -- the prospectus wasn't even meant to be distributed in the U.S. We don't want the United States courts to be spending their time with that.

But in the subject matter jurisdiction part of the court's decision, the court makes a very telling comment. It talks about, again, the interests of the courts in adjudicating these kinds of cases.

In this case we do have subject matter jurisdiction. We have foreign defendants who came to the United States to perpetrate a fraud with the avowed purpose, and that's his own words, to double the stock ownership of Vivendi amongst U.S. owners.

Mr. Saunders said only 85 to 95 percent of the damages are -- he says 85 to 95 percent of the damages are overseas.

We vigorously dispute that. We think, as in Ahold, it's closer to 20 to 40 percent of the damages in the U.S.

In any event, here, when a defendant comes to the United States to this district and perpetrates fraud, the United States has an important sovereign interest -- and this is articulated in other subject matter jurisdiction cases -- of making sure that before you come to the United States and perpetrate fraud, you had better be subject to the full deterrent power of U.S. law.

The Second Circuit does not give foreigners the right to sue in this court because it likes foreigners. If it did, you wouldn't have the conduct test. Every foreigner could always come into the United States and sue.

Why does the Second Circuit, why do the other courts of appeals allow subject matter jurisdiction in cases where the conduct test is met? It is because U.S. courts don't like it when the U.S. soil and U.S. territory is used as a base of operations for committing fraud.

Vivendi says, I wish we could have a complete guarantee of global peace in this case. That's very nice. I understand why Mr. Saunders' client would want that, but I think when you weigh it in the balance against the sovereign interest of the United States in applying its law to defendants who came here and perpetrated a massive fraud, I think that, weighing those concerns in the balance, it is very easy to understand why this court should not as a matter of U.S. law as a matter of U.S. sovereign interest relinquish its jurisdiction based on the theoretical possibility that a judgment --

THE COURT: Of course, that's why Judge Baer denied the motion to dismiss, but the subject matter jurisdiction issue is a tad bit different than the class certification issue.

MR. FREDERICKS: It is, but I think that the policy concept is the same.

Why should Vivendi have a break compared to other companies that list on the stock exchange in its saying that, well, we really aren't subject to the full wrath of shareholders if we are wrong.

But I think, more importantly, you know, Mr. Saunders talks in terms of entitlement and due process. There is no due process argument. There is no entitlement interest. It's an interest Vivendi has. But that interest has to be weighed against all the other interests at play, and I think that in this case the standards have been set. The markers are there. The near certainty test is a marker. It's the best that's there. It's been embraced by many courts. Defendants cannot meet the near certainty standard here.

They talk about the pendency of actions in France. There are three actions pending in France. I think that one involves an action on behalf of 97 shareholders. As our declarations point out, that action represents a tiny fraction of the shareholders. It's been brought by a lawyer of, shall I put it modest, of no great repute in France. His primary interest seems to be in divorce cases, and he represents French police officers for the ministry of justice. He's been sanctioned by the disciplinary board over there.

I think it is very telling that in the year since that action has been filed no one else has joined in. I think it's really a red herring to suggest that Mr. Coneuil is going to be a superior action.

I can understand why Vivendi would prefer to have claim against it litigated by Mr. Caneuil. I don't see what the interests of justice are that would have, that would weigh in favor of pursuing Mr. Caneuil's action instead of this action. This action is clearly superior.

Mr. Saunders has conceded the integrity of the experts on foreign law. He says that Judge Cote and Judge Sweet have misinterpreted Bersch, but I think if you look at the Bersch case, Judge Cote and Judge Sweet are entirely right. Even the Bersch court noted that the near certainty test was only one of five factors that should be considered in determining whether to allow a class action pendent in that case.

THE COURT: I must say I can't find that articulation in the decision itself.

MR. FREDERICKS: The factors that the Bersch court looked at, and I think it is at page 996 of the Bersch decision, the five factors the Bersch court looked at were common law fraud claims of foreign class members were vastly greater than those of U.S. class members. There were only 386 U.S. class members out of up to 25,000 total class members.

The second factor is the foreign character of the suit. The common law fraud would require application of the laws of up to 14 countries. Of course, that doesn't apply here your Honor because we are only applying Rule 10(b).

The third other factor by Bersch was comity because it says there really was no domestic --

THE COURT: I don't disagree that those issues are raised. But they're raised -- again, I'm repeating myself, maybe we all are at this point. They are raised in the context of pendent jurisdiction. They are not articulated as five reasons one should or should not certify a class.

MR. FREDERICKS: I think that that is true.

THE COURT: That's the gloss that other courts have perhaps put on the decision.

MR. FREDERICKS: I think that it's useful guidance, and I would suggest that Judge Sweet and Judge Cote probably provide the most useful modern guidance as to what the appropriate considerations are.

If I could just sort of end on some of those pragmatic considerations. First of all, Mr. Saunders says, well, we can't be assured of res judicata if the class is certified that includes foreigners. This case is going forward regardless.

THE COURT: He says more than that. He says that we will not get res judicata.

MR. FREDERICKS: He says we won't get res judicata. We disagree.

But let's take him at his word. If this case goes forward and foreign class members are not included in the class, he's not going to get res judicata. That will be a certainty. If the foreign class members are excluded from the class, Mr. Saunders will have certainty. There will be no res judicata effect on foreigners in this action.

So what's the difference? If the court certifies a class with foreign purchasers here, at least Mr. Saunders has a pretty good fighting chance of getting some res judicata.

I think it is telling, your Honor, that I think the Ahold defendants made that calculus as well when they agreed to settle a global case because at least they knew they had a pretty decent chance of getting res judicata abroad. I doubt they would have settled on those terms if they hadn't.

I think that the real truth of the matter here is this case is going on here in fact exactly the same way against exactly the same defendants. The same depositions are going to be taken, the same amount of effort will occur, except Mr. Hillsey and the defendants will have to do more work on class notice regardless of whether the class is certified. If

foreigners are included, there's a decent chance that there will be res judicata overseas. We would put it more affirmatively than that. The only circumstance in which there's definitely not going to be res judicata is one where the foreigners are excluded. Finally --

THE COURT: I think you have covered it.

MR. FREDERICKS: I think I have covered everything.

I do want to make a note of the argument about the differences between ordinary shareholders and the ADS's.

Just very briefly, if the Court looks at our submissions, Mr. Saunders says you can't have ordinary shareholders and ADS's in the same class because they are not perfect substitutes. That is the entire basis of his argument and his expert's argument.

THE COURT: I don't think we need to address that any further.

MR. FREDERICKS: That's fine.

I again would be happy to address any adequacy issues or anything else the court may want to deal with.

THE COURT: All right.

Thank you very much, counsel. I am going to reserve decision. The argument has been very helpful.

(Adjourned)

APPENDIX S

ANDREW LONGSTRETH, "COMING TO AMERICA WHEN CAN FOREIGN INVESTORS WHO BOUGHT SHARES OF FOREIGN COMPANIES ON FOREIGN EXCHANGES SUE IN THE U.S.? BILLIONS OF DOLLARS IN SETTLEMENTS AND ATTORNEYS' FEES CAN HANG ON THE ANSWER", AM. LAW., NOV. 2006

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COMING TO AMERICA

WHEN CAN FOREIGN INVESTORS WHO BOUGHT SHARES OF FOREIGN COMPANIES ON FOREIGN EXCHANGES SUE IN THE U.S.? BILLIONS OF DOLLARS IN SETTLEMENTS AND ATTORNEYS' FEES CAN HANG ON THE ANSWER

Andrew Longstreth

It's known as the 'f-cubed' problem, and it may be best illustrated by the major shareholders at Royal Ahold N.V., who found themselves owning large chunks of a global grocery store conglomerate, Royal Ahold N.V., that one day in 2003 publicly admitted to a spectacular accounting scandal.

That was very bad news for Union Asset Management Holding AG (UAM), a large German institutional investor. Between March 2001 and January 2003, Union Asset bought more than $41 million worth of shares in Amsterdam-based Royal Ahold, all on a European stock exchange. Then in February 2003, Ahold announced that it had overstated earnings by more than $500 million during roughly the same

period. In the United States, where Ahold owned several food chains, local shareholders quickly brought a securities class action. But what relief was available for UAM and the other overseas investors? After all, Royal Ahold isn't an American company. Most of its shareholders didn't buy their shares on an American stock exchange. Could UAM and other foreign investors that bought this foreign company's securities on foreign exchanges seek recoveries in the United States?

For decades, the so-called foreign, foreign, foreign problem--f-cubed--was an issue seldom found in courtrooms. But in the last few years, it has popped up in some high-profile securities class actions, giving the issue a new prominence. Cases involving alleged frauds at Vivendi Universal, S.A., Parmalat Finanziaria S.p.A, Bayer AG, Royal Dutch Shell plc, and Royal Ahold have all raised versions of the question. And the answers can be significant and sometimes costly for defendants.

In the Royal Ahold case, for instance, a federal district court ruled in December 2004 that foreign class members could participate in the class action, which ultimately settled for $1.1 billion. In the case, defense lawyers estimated most of the plaintiffs were foreign investors who bought on exchanges in Europe. If the court had forced those shareholders to seek compensation in their own jurisdictions, where they likely would have faced tougher obstacles to recovery, the size of the U.S. case would have been much smaller. So would the 15 percent cut of the total settlement--amounting to $165 million--the class action lawyers have asked to receive.

In the current age of global markets and dual listings, it's a safe bet that more tests of the f-cubed issue will follow. 'As the market for securities becomes more global and more linked, it does become a little artificial to say 'Well, only shares that are purchased in the U.S. exchanges are deserving

of compensation and not people who bought on another exchange,' when they're really two portals to the same market,' says Columbia University School of Law professor Merritt Fox.

When Congress passed the country's principal securities laws in the 1930s, it was silent about how far they should extend beyond the U.S. border-- or if they should at all. As one federal judge has noted, 'The web of international connections in the securities market was then not nearly as extensive or complex as it has become.'

That sentence was written in 1987. Since then that web of international connections has grown even more tangled. Many companies, seeking to optimize their opportunities to raise capital, list on more than one exchange. And now, exchanges are merging and crossing borders. In June, NYSE Group, Inc. announced an agreement to merge with the European exchange operator Euronext N.V., which has already integrated several markets across Europe.

But even before that merger announcement, global companies had long been coming to the U.S. seeking to raise capital. Their presence comes with a well-known price: the American litigation system. From 2004 through 2005, 48 foreign companies have been sued in securities class actions, according to a study by PricewaterhouseCoopers. Many of those cases involve foreign plaintiffs who bought their securities in foreign markets.

As a result, American class action lawyers are aggressively pursuing foreign clients. Each plaintiffs firm has its own strategy, but the goal is the same: Sign up lead plaintiff contenders as clients, boosting the firm's chances of being named lead counsel and eventually raking in huge attorneys' fees. (In cases in which the lead plaintiff is a domestic entity, American plaintiffs lawyers still have an interest in making sure that foreign shareholders are included

in the class they purport to represent. The reason is simple: The bigger the class and case, the fatter their attorneys' fees will be under any settlement.)

And European institutions are increasingly receptive to overtures from American plaintiffs lawyers. Overseas investors see the U.S. court system-- where plaintiffs lawyers shoulder the risk by getting paid on contingency--as often the best venue to recover losses. To ensure a piece of the recovery pie, they're also increasingly willing to play the role of lead plaintiff. 'There's a fear among Europeans that if they don't play an active role [in U.S. litigation], they may be excluded from the class,' says Mark Willis, partner at Cohen, Milstein, Hausfeld & Toll.

Firms are making sure that foreign clients are served. In May, New York-based class action firm Labaton Sucharow & Rudoff announced the creation of a joint alliance with TILP International, a law firm headquartered in Germany. TILP's clients include Deka Investment GmbH, one of Germany's largest fund managers and an active player in U.S. class actions. Under the arrangement, TILP and Labaton, which had not previously worked together, will refer clients to each other, but remain separate firms. Labaton calls the arrangement with TILP 'the world's first truly international practice dedicated to representing institutional investors in class actions and complex securities cases.'

In March members of plaintiffs firm Schiffrin & Barroway, based in Radnor, Pennsylvania, crossed the Atlantic to host an investors' seminar in Amsterdam on the responsibilities of 'active ownership'--including securities litigation. It's all part of 'S&B's philosophy of education,' as name partner Richard Schiffrin put it during the event. The seminar attracted more than 100 delegates from institutional investors around the world, who collectively manage over $1 trillion in assets, according to the firm's promotional newsletter.

The thought of American plaintiffs lawyers 'educating' foreign clients about how to sue in the U.S. isn't likely to sit well with defendants. Not surprisingly, their lawyers have become judicial isolationists and opponents of what they call overreaching by American courts, which they claim Europeans detest. Lawrence Byrne of White & Case believes that the intent of the securities laws clearly does not include foreign purchasers of securities on foreign exchanges. 'The policy behind the U.S. securities laws was to protect investors in the U.S.,' says Byrne.

But because Congress never expressly made the reach of securities laws clear, courts have created two principal tests--the 'conducts' and 'effects' tests--to decide whether they have subject matter jurisdiction over foreign plaintiffs who bought on foreign exchanges. In the 'conducts' test, courts look for action in the U.S. that was more than 'merely preparatory' to the fraud and directly caused the foreigners' losses. In the effects test, courts look for conduct abroad by defendants that had a 'significant' effect on the U.S. market. In a seminal opinion on subject matter jurisdiction involving foreign securities transactions, Bersch v. Drexel Firestone, Inc., U.S. Court of Appeals for the Second Circuit judge Henry Friendly wrote in 1976 that the goal is to 'seek to determine whether Congress would have wished the precious resources of the United States courts and law enforcement agencies be devoted to them rather than leave the problem to foreign countries.'

Both tests require fact-specific inquiries. In the case against Vivendi, the issue turned on where two of its senior officers spent their time. In 1996 Vivendi, a water utility, embarked on a spending spree in which the company bought equity stakes in various companies to become a media giant. To carry out the company's acquisition strategy and promote its vision on Wall Street, CEO Jean-Marie Messier and CFO Guillaume Hannezo moved to New York--where Vivendi's stock traded as an American Depository Receipt--in 2001.

Their plan didn't quite work out: Vivendi ended up with more than $18 billion in debt and a liquidity crisis.

In 2002 Vivendi investors worldwide sued the company and its former executives in federal district court in Manhattan, alleging that the company had issued rosy press releases and statements to prop up its stock, which it used as acquisition currency. The Vivendi defendants argued that the U.S. court did not have jurisdiction over foreign class members who bought shares on foreign markets. They presented affidavits from company officials asserting that the press releases at issue were prepared and approved at the company's headquarters in Paris. They also noted that even though Messier and Hannezo moved to New York, they spent half their time in Paris. Finally, they said Vivendi, a French corporation that did not make filings with the Securities and Exchange Commission, typically issued its releases in Paris before they were disseminated onto the newswire for global access.

But federal district judge Harold Baer, Jr., was swayed by the significance of the conduct in the U.S. In an opinion denying Vivendi's motion to dismiss in 2003, Baer wrote, 'Given Messier's and Hannezo's decision to move to the United States, allegedly to better direct corporate operations and more effectively promote misleading perceptions on Wall Street, which harbors some of the most watched securities exchanges in the world, one can reasonably infer that the alleged fraud on the American exchange was a 'substantial' or ' significant contributing cause' of foreign investors' decisions to purchase Vivendi's stock abroad.'

In the Royal Ahold class action, the defendants similarly argued that foreign purchasers should not be in a U.S. court. Shares and ADRs of Ahold, which is based in the Netherlands, are listed on exchanges in New York, Amsterdam, and Zurich. Plaintiffs from the U.S. and abroad

sued the company after it restated its earnings in 2003 by what ultimately turned out to be more than $1.2 billion.

From 1996 to 2001, Ahold made 50 acquisitions worth $19 billion, according to the shareholders' complaint. Many of the acquisitions were made in the U.S. through its subsidiary, USF, which became one of the largest food-sellers and providers in the country. Ahold investors alleged that the company was able to finance its buying spree through artificially inflating the value of its shares and credit rating by using improper accounting in statements made to European regulators and the SEC.

Ahold contended that the alleged false statements made to the SEC did not directly cause the losses incurred by foreign plaintiffs, who bought their shares on a European exchange after relying on corporate information coming out of the company's headquarters in the Netherlands. But Maryland federal district court judge Catherine Blake sided with the plaintiffs, who pointed out that the allegedly false financial results and misrepresentations issued by Royal Ahold originated in the United States and were filed with the SEC.

Going forward, the key question is how far plaintiffs lawyers can push the tests in order to bring cases here on behalf of shareholders who bought securities on foreign exchanges. What kind of conduct or effect in the U.S. must they present? The next big decision could come in the case of Parma, Italy-based Parmalat.

In November 2003, Parmalat defaulted on a $185 million bond payment. The next month, after auditors and banks took a closer look at Parmalat's books, they learned that the company claimed to have $4.9 billion in a Bank of America account for a subsidiary in the Cayman Islands. But Bank of America reported that no such account existed. On December 24, the firm filed for bankruptcy in an Italian

court. The SEC called it 'one of the largest and most brazen corporate financial frauds in history.'

By early 2004 investors in the U.S. and abroad had sued the dairy company's former directors and officers, lawyers, accountants, and investment banks in the U.S. Plaintiffs alleged that defendants pulled off the fraud through 'forged financial records, and the manipulation of Parmalat's balance sheet and income statement through fictitious investment assets and sham transactions.'

The majority of Parmalat shares and bonds were traded in Europe. And many of the big Parmalat holders were based abroad, which meant that the f-cubed issue would have to be faced. At a hearing to choose the lead plaintiffs, Stuart Grant of Grant & Eisenhofer, who represented the British fund manager Hermes Pensions Management Ltd, argued that his client was typical of the class and thus best suited to lead it.

'The bulk of the class are foreign purchasers,' said Grant. 'We are not talking about a situation where an overwhelming majority of the class is in the U.S., bought on a U.S. exchange and all that, and, gee, do you want someone who has got something slightly different leading the class. We are talking about the bulk, overall majority of the class having the same issues.'

William Lerach of Lerach Coughlin Stoia Geller Rudman & Robbins countered that his clients, which included the Southern Alaska Carpenters Retirement Trust Funds, were not similarly positioned to Hermes. If his clients became lead plaintiffs, the f-cubed problem would not be a potential stumbling block in the litigation: 'It is simply not true to state, as Mr. Grant did, that all plaintiffs face this jurisdictional issue. They do not. There is no fair question or dispute over the subject matter jurisdiction of this court over purchasers who are U.S. citizens, whether they reside in the U.S. or not.'

But Lerach could not persuade Judge Lewis Kaplan of the Southern District of New York to choose his clients. In 2004 Kaplan appointed Hermes to lead a class of shareholders and three European fund managers to lead a class of bondholders.

That left Grant and his colleagues with the task of making the case that foreign purchasers of Parmalat stock could make claims in an American court, even though Parmalat executives based in Italy were most responsible for the fraud. Lawyers for the plaintiffs called the U.S. the 'nerve center' for the scandal. They pointed to Parmalat's outside lawyers in New York--BBLP Pavia e Ansaldo and Zini & Associates--who allegedly carried out orders by Parmalat executives. The Parmalat plaintiffs also emphasized the global scope of Parmalat's stakeholders: 'There was but a single worldwide market for Parmalat securities. Parmalat securities were priced based on trades reported from various exchanges [in Uruguay, Italy, Luxembourg, and New York]. That worldwide market was defrauded by defendants' conduct, causing extensive effects on domestic purchasers of Parmalat securities, as well as on securities markets abroad.'

Two bank defendants in the Parmalat case--Credit Suisse First Boston, Inc., and Banca Nazionale del Lavoro S.p.A.--have already successfully convinced the court that claims for foreign purchasers did not meet the conducts test. The banks showed that the transactions for which they were named--allegedly creating fictitious assets for Parmalat--took place outside the U.S.

Most of the defendants, including Citigroup Inc. and Bank of America Corporation, did not raise subject matter jurisdiction at the motion to dismiss stage. (Parmalat, which filed for bankruptcy in Italy, was not originally named in the complaint. This summer, the plaintiffs were allowed to amend their complaint to name the new Parmalat, the entity which emerged from bankruptcy court.) However, many of

them could tee up related issues in their motions on class certification, which may be submitted by the end of the year.

The defendants could argue that several judicial and administrative issues make a worldwide class unworkable. How can a U.S. court certify a worldwide class? How can a U.S. court bind shareholders around the world? Would courts around the world recognize a worldwide settlement? Given that the judge in the case, Lewis Kaplan, has issued some of the most talked-about opinions in securities class actions and white-collar criminal cases, the decision on class certification will be widely read.

Meanwhile, opportunities to push this area of the law will likely keep arising. Schiffrin & Barroway partner Darren Check says European investors are becoming more receptive to the idea of pursuing litigation in the U.S. Some are even aggressively looking for opportunities to bring cases here. Check says a Swedish investor client recently called the firm to discuss its investment in a European company that was being bought out under allegedly unfair terms to company shareholders. The client wanted to know if any legal action could be taken in the U.S.

'It was a wake-up call [to our firm],' says Check. 'Once you make people aware, they're going to make use of tools available to themselves.'

Some plaintiffs lawyers are wary of their brethren pushing the limits. 'There is some risk that if [plaintiffs] push too hard there could be a backlash, ' says Thomas Dubbs of Labaton.

Maybe. But as markets continue to integrate and more companies expand globally, it will have to be a long sustained backlash to keep foreign investors out of U.S. courts.

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APPENDIX T

MARY JACOBY, "COURTING ABROAD: FOR THE TORT BAR, A NEW CLIENT BASE: EUROPEAN INVESTORS", WALL ST. J., SEPT. 2, 2005

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HEADLINE: Courting Abroad: For the Tort Bar, A New Client Base: European Investors --- Often, Overseas Shareholders Are Plaintiffs in U.S. Suits;
The Business Lobby Frets --- Mr. Lerach Battles Belgians

BYLINE: By Mary Jacoby

BODY:

Plaintiffs lawyers, long the scourge of big business, are facing serious obstacles in the U.S. New laws are capping damages and making it harder to move cases to friendly jurisdictions.

Now, some of the biggest names in the plaintiffs bar have a new strategy: Hunt for plaintiffs in Europe.

New York's Milberg Weiss Bershad & Schulman LLP, a pioneer in the field, says it represents European and other overseas plaintiffs in 27 U.S. class actions. Cohen, Milstein, Hausfeld & Toll PLLC, of Washington, D.C., has teamed up with a Belgian consulting company -- which is feuding with another high-profile U.S. lawyer, William Lerach -- to recruit

local clients. Schiffrin & Barroway LLP of Philadelphia has translated its Web site into 16 languages and is working the European conference and debate circuit to drum up business.

"All the fields have been plowed in the United States," says Brian Murray, a partner of New York's Murray, Frank & Sailer LLP, which has joined forces with German law firm Tilp Rechtsanwalte to recruit Germans for U.S. class actions. "If you want to enter new markets, you have to go outside the United States."

The tort bar's newfound interest in overseas clients -- in particular, those involved in securities litigation -- is driven by a broader phenomenon: the globalization of business and investing. In U.S. securities cases, judges are required to tap shareholders with the largest losses as the lead plaintiffs. Increasingly, these shareholders are based overseas, from pension funds to hedge funds and private-equity players.

Many of the same lawyers are also encouraging European countries to revamp their legal codes and move toward U.S.-style lawsuits. Until that happens, overseas funds can sue American and even non-American companies in U.S. courts if the defendants sold stock or conducted business on American soil. The incentives for attorneys are clear: The law firm representing the lead plaintiff typically reaps the largest share of any settlement or judgment.

One of Milberg Weiss's clients is retired tire-company executive Markus Blechner. Last year, when DaimlerChrysler AG paid $300 million to settle allegations it mislead U.S. investors, the Swiss national received nothing because he had purchased his shares in the auto maker on a Swiss exchange. He sought out Milberg Weiss, a prime mover in the creation of the U.S. tort industry.

"I thought, 'That's not fair. Don't I deserve to get paid, too?' " recalls Mr. Blechner. He and two Austrian investment funds are now suing the auto maker in U.S. federal court in

Delaware. "Why not? It doesn't cost me anything," Mr. Blechner says. Han Tjan, a DaimlerChrysler spokesman, says the company is arguing the suit be dismissed for lack of U.S. jurisdiction, among other things.

Milberg Weiss is also representing several French clients in a class action pending in the Southern District of New York against Vivendi Universal SA, a French media company accused of overstating revenues. In addition, the law firm has been retained by overseas shareholders of Merck & Co., Ahold NV and Biogen Idec Inc.

Some Europeans retain a sense that American litigation is unseemly and vaguely scandalous. That has created hurdles in recruiting clients. Now, Melvyn Weiss, a founder of Milberg Weiss, and Mr. Lerach, a former Milberg partner, are under federal criminal investigation for allegedly conspiring to pay kickbacks to plaintiffs in scores of securities suits since the 1980s.

Milberg Weiss has called the allegations "baseless" and says it is cooperating with the federal investigation. Mr. Lerach says he's "done nothing wrong" and is also cooperating.

According to a study by accounting firm PricewaterhouseCoopers, U.S. and foreign investors brought class-action lawsuits against 29 foreign-based companies in U.S. courts last year. That's the highest number of non-U.S. corporate defendants ever, representing 14% of private investor lawsuits, the study says.

This overseas prospecting has set off alarm bells at the U.S. Chamber of Commerce, the business lobby that has worked for years to limit such lawsuits in the U.S. and now fears them metastasizing in Europe. Germany, Sweden, the Netherlands, France and Italy have either adopted or are considering limited forms of class-action suits. Business lobbies are fearful of what they see as trial lawyers' long-

term strategy: harmonizing international laws under a U.S. model to enable cross-border shareholder actions.

In a speech in Paris earlier this year, U.S. Chamber President Thomas Donohue complained that American trial lawyers were "going into the export business."

Class actions are suits typically filed by a few plaintiffs on behalf of a larger group in similar circumstances. They were initially designed to help process large civil claims. But by the mid-1990s, class-action suits had become a controversial legal tool. Critics charged that trial lawyers were rounding up small-time investors as figureheads who received pennies per share in settlements while law firms reaped millions.

In 1995, a Republican-led Congress passed the Private Securities Litigation Reform Act over the veto of President Bill Clinton. The law directed judges to appoint investors with the largest losses to lead class actions, a bid to transfer control of cases from lawyers to investors. Congress didn't foresee that the law would draw foreign investors into U.S. courts and made no attempt to exclude non-U.S. plaintiffs, who now, thanks to the internationalization of high finance, are often large shareholders in domestic companies.

In February, President Bush signed the Class Action Fairness Act, making it harder for plaintiffs to move their cases to the friendliest state courts. The new law didn't address the issue of overseas investors seeking redress in U.S. courts.

Now Europeans are pursuing in the U.S. the kinds of big-money lawsuits still largely discouraged in their own countries. Some of the legal principles involved are still being worked out as judges decide case by case whether overseas plaintiffs have jurisdiction to sue in the U.S.

But those trying are taking advantage of a crucial difference: Europe has laws that require the losing side to pay the winner's legal expenses, a custom which has damped the filing of suits. By contrast, lawyers in the U.S. front the money for lawsuits in hopes of taking a slice of any settlement, while clients risk nothing. Moreover, plaintiffs in the U.S. can demand documentation from defendants to help prove their cases, a legal procedure known as discovery that is generally weak or absent in Europe.

In June, in a velvet-draped dining room in Paris's Salon-Club De La Maison Des Arts et Metiers, Richard Schiffrin, a founding partner of Schiffrin & Barroway, was put to the test as he fielded hostile questions during a dinner debate hosted by a French corporate governance group. The topic was French President Jacques Chirac's proposal to introduce a form of class actions in France.

An executive of a French nuclear-power company denounced U.S.-style class actions with allusions to Franz Kafka and the French Revolution. The president of a French minority-shareholder's group complained about the high fees demanded by U.S. plaintiff lawyers, declaring: "If we are going to launch class actions in France, we have to make sure it doesn't become a business."

Mr. Schiffrin removed his translation headphones and grabbed a microphone. He acknowledged lawyers in the past commanded fees of up to 30% of a settlement, but said coveted institutional investors now have the clout to pay fees of between 15% and 20%. While lower fees are "not in my mathematical interest," Mr. Schiffrin conceded, he called them good for society, "as a question of justice and propriety."

The discussion moderator, French corporate-governance advocate Jean-Aymon Massie, chuckled. "Well, Mr. Schiffrin. You're a good marketer," he said.

Mr. Schiffrin's firm has nonetheless run into problems typical of those exploring new businesses overseas. Schiffrin & Barroway used translation software to convert its Web site into a number of languages, including traditional and simplified versions of Mandarin Chinese. The result was occasionally gibberish: German readers were told the law firm specialized in the "persecution of certainties [and] military officers." The firm fixed the problem a year ago.

Some cultural barriers are more elemental. In his search for clients, Mr. Weiss relies on a multilingual colleague, Deborah Sturman, to navigate the more subtle aspects of doing business in Europe. "It's a big advantage to have someone who can speak these languages," he said in a Geneva hotel lounge in March, as he ordered a cocktail the night before a financial conference.

The attorney lifted his drink and wrinkled his nose. "What's this?" he asked Ms. Sturman, the firm's point person in Europe, handing her his flavored vodka. Ms. Sturman flagged down a waiter. "Sans gout," she instructed the waiter, French for "unflavored."

European investors, for their part, haven't entirely embraced the class-action concept, sometimes to their financial detriment. In 2000, Belgian investors declined to join a U.S. class-action lawsuit against Belgian software maker Lernout & Hauspie Speech Products NV, in part because the concept was unfamiliar. Instead, the Belgians filed suit on home turf.

Long after the company sought bankruptcy protection amid an accounting scandal, the Belgian action is still pending. But Lernout & Hauspie's auditors have already paid $115 million to settle with U.S. investors and the company has depleted its directors' insurance. Hundreds of Belgians may get nothing.

Despite these hiccups, U.S. firms are jostling each other in their search for a new client base. Mr. Lerach, who split from Mr. Weiss last year, tried unsuccessfully to recruit major investors bringing suits relating to the accounting scandal at Italian diary giant Parmalat SpA. One object of his wooing, Hermes Focus Asset Management Europe Ltd., a British fund that's now a lead plaintiff in a Parmalat-related U.S. class-action, decided to go with Delaware-based Grant & Eisenhofer PA.

Mr. Lerach says he doesn't know why Hermes chose other counsel. He says "we weren't happy with them, either," because the firm backed out of an agreement to retain him. A spokeswoman for Hermes, Sarah Parks, says the fund didn't have a formal agreement with Mr. Lerach.

Erik Bomans and Umberto Mosetti, of shareholder adviser Deminor International SCRL, say Mr. Lerach arrived at meetings in oversized vehicles, brushed off questions and pressured potential clients to make quick decisions. Brussels-based Deminor helps aggrieved investors find suitable legal representation, among other shareholder services.

At one meeting in Brussels, Mr. Bomans recalls asking Mr. Lerach: "Why this big bus? You are just two persons." Mr. Lerach replied that he'd simply asked for the rental agency's biggest car, Mr. Bomans recalls. Mr. Bomans says the vehicle was too large to park on the city's narrow streets and Mr. Lerach's driver was forced to drive around while the men ate.

Mr. Lerach disputes Mr. Bomans's recollection. He says he rented a Volkswagen van, and "not some rock-and-roll bus," because he wanted to accommodate his associates and the Deminor consultants.

Mr. Lerach says further that the Deminor consultants are trying to get back at him because their business relationship didn't work out. "They wanted to bring us

clients for one-third of our fee, and we refused to do that," he says.

Cohen, Milstein, by contrast, decided to work with Deminor. The law firm, which says it pays the consultants on a hourly basis, represents Deminor clients from France, Italy and Belgium in a separate U.S. class action led by holders of Parmalat bonds.

One of the firm's partners, Michael Hausfeld, wants to harmonize all kinds of tort law across international borders, relating not only to securities cases but also product liability, among other areas.

In May, in a hotel conference room overlooking a bustling square in Milan, Italy, Mr. Hausfeld opened a conference aimed at coordinating the efforts of international trial lawyers. Behind him loomed a projector screen with the slogan, "Creating a Global Alliance," imposed over a map of the world.

Just as international cartels, polluters, human-rights violators and rogue corporations aren't constrained by national borders, neither should lawyers be. Mr. Hausfeld told colleagues from Europe, South Korea, Australia and South Africa. He encouraged them to lobby for U.S.-style legal systems in their home countries.

"We're here in Milan not to say cases should be brought in the United States, but brought anywhere," Mr. Hausfeld said.

Foreign Exchange

A sampling of U.S. class-action settlements involving companies based
overseas.

HEADQUARTERS		SETTLEMENT DATE	SETTLEMENT, IN MILLIONS
DaimlerChrysler	Germany	February 2004	$300.0
Deutsche Telekom	Germany	June 2005	120.0
Elan	Ireland	February 2005	75.0
MTC Electronic Technologies	Canada	October 1998	70.0
Independent Energy Holdings	U.K.	September 2003	48.0
Laidlaw	Canada	December 2002	42.9
Cinar	Canada	November 2002	27.3

Source: Institutional Shareholder Services Inc.

NOTES:
PUBLISHER: Dow Jones & Company, Inc.

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APPENDIX U

RICHARD O. FAULK, "ARMAGEDDON THROUGH AGGREGATION? THE USE AND ABUSE OF CLASS ACTIONS IN INTERNATIONAL DISPUTE RESOLUTION", 37 TORT & INS. L.J. 999 (2002)

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*999 ARMAGEDDON[1] THROUGH AGGREGATION? THE USE AND ABUSE OF CLASS ACTIONS IN INTERNATIONAL DISPUTE RESOLUTION

Richard O. Faulk[a1]

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I. INTRODUCTION

A troubling and dangerous phenomenon has emerged onto the international litigation landscape. The system of justice understood and appreciated by citizens in most democratic states-one that guarantees individual plaintiffs and defendants their day in court-is increasingly being side-stepped by procedural rules that allow entrepreneurial lawyers to aggregate claims into massive controversies that, for all practical purposes, cannot be tried. Although these enormous cases arise in varying formats, they share a single intimidating characteristic: the designed imposition of

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[1] Armageddon is the Biblical site of the final climactic battle between the forces of good and evil. *See Revelation 16:16.*

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enormous and intolerable risks that defendants cannot prudently accept by insisting on their day in court in a jury trial.

Although some courts have refused to accept this type of "judicial blackmail," the practice has not been disapproved uniformly. Indeed, the mere threat of international class actions, especially those regarding human rights violations occurring in other countries, has produced gigantic settlements in the United States. The recently concluded slave labor and Holocaust victims' class actions against German companies and Swiss banks are illustrative. In those controversies, sovereign states and major international institutions paid billions of U.S. dollars to resolve claims by many persons residing outside the United States arising from activities occurring *1000 wholly outside the United States. Moreover, the settlements occurred not only in the absence of any adverse rulings on the merits of the case, but also, at least insofar as the Germans were concerned, despite favorable rulings holding that the matters were not justiciable in U.S. courts. Most importantly, the settlements occurred before classes were certified, thereby demonstrating the coercive effects of class allegations.

The use of these techniques by entrepreneurial lawyers is understandable in view of their predictable effects, namely, enormous and relatively prompt settlements and extraordinary fee recoveries for the lawyers themselves. With few exceptions, the public record conclusively demonstrates that once a controversy is aggregated to the point where the "blackmail" threat arises, settlement is inevitable unless the threat is eliminated by interlocutory appellate review or bankruptcy. As a result, major controversies that involve large numbers of claims and that significantly impact the public interest and private coffers are involuntarily decided outside of the judicial process, thereby bypassing all of the procedural safeguards, protections, and guarantees that the

litigation process provides to participants in all other types of cases.

Unfortunately, the unfairness of this phenomenon impacts individual plaintiffs as well as defendants. Settlements achieved in mass tort cases are fraught with potential conflicts of interest between individual plaintiffs and their counsel. Moreover, the potential for collusive settlements-settlements that end the controversy, compensate plaintiffs' counsel highly, and undercompensate individual plaintiffs-cannot be disregarded. Unless the system permits sufficient attention to individual claims and adequate representation of individual interests, there are genuine risks that individual plaintiffs' rights may be trampled in the stampede to settlement.

The use of U.S. or, for that matter, any other nation's collective liability devices to resolve claims of nonresident foreign litigants represents a major intrusion into the internal social policies and cultures of other sovereign states. Although "globalism" may be useful as a commercial cliché, its intrusion into jurisprudence is disturbing, especially when procedural devices that are not yet recognized internationally are used to resolve claims arising from conduct that occurs beyond the forum state's borders. Accordingly, it is prudent that proposals seeking to expand the use of the class device internationally or allowing the international enforcement of class action judgments by treaty should be evaluated cautiously. To the extent that such proposals are considered, they should not focus solely upon enhancing claimants' access to justice. They must also guarantee that defendants are not oppressively denied their opportunities to be heard.

There are three serious obstacles to compromise on this issue. First, the necessity of class actions is questionable in systems outside the United States. Second, long-standing civil law principles militate against the creation*1001 and implementation of class action practices that depend upon

equitable principles and discretionary certification and administration. Finally, the selective adoption of U.S.-style class action rules by individual nations, such as those in the European Community,[2] threatens a barrage of forum shopping by litigants and counsel who seek to create transnational class actions. Although each of these issues will be discussed, this article does not purport to solve these problems. Instead, this article questions whether there is a need to create them in the first place. Any attempts to introduce class action practice into the international arena should be approached with the utmost caution, with full awareness of the cultural limitations of the forum's system of jurisprudence, the serious potential for abuse inherent in the process, and the consequences of enabling extraterritorial class actions within the forum's national courts.

II. ARE INTERNATIONAL CLASS ACTIONS NECESSARY?

A. *Are Class Actions Necessary to Motivate Responsible Behavior?*

The debate over the scope and utility of class actions is a controversy over fundamentals, namely, the role of private litigation in governance. Differing cultures have widely contrasting views on that subject. The United States maintains a strong tradition, especially in civil rights litigation, that supports the use of class actions to influence social policy and to modify behavior. Outside the United States, virtually no nations have such a tradition. Instead, other countries commonly rely upon governmental regulation and public enforcement proceedings to protect the public interest. The concept of the "private attorney general," a citizen or advocate who represents the public interest and who uses the judicial system, as opposed to parliamentary action, to advance social aims or redress public wrongs, is

[2] Hereinafter EC.

not commonly accepted outside the borders of the United States. This fundamental disagreement over the role of private litigants and the judiciary underlies many of the obstacles to expanding class action procedures into Europe and other regions.

There are serious questions regarding the necessity of class actions involving claims beyond those for arithmetically calculable damages.[3] Given the extensive reliance on governmental regulation and enforcement in the EC and elsewhere, as well as the pervasive social welfare systems already *1002 in place, there is little incentive to use class actions seeking tort damages as a tool of social engineering.[4] To date, no studies have been published establishing that, in liberal social democracies, there is a need for tort litigation to regulate corporate behavior. There is no empirical evidence that threats of litigation are necessary to

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[3] For reasons of space, and not necessarily of philosophy, this article addresses the issues of class action abuse solely in the mass tort context, where individual amounts in controversy are typically sufficient to motivate claimants to file individual actions, and where damages are intangible and not susceptible to arithmetical calculation. Nothing in this article should be construed to suggest that serious obstacles do not exist to unrestricted recognition of class actions for commercial claims. Those discussions, however, must await development in another article.

[4] The author recognizes a distinction in this article between U.S.-style "class actions" and "group actions," as that term is used in certain European and Latin American countries. A "class action" within the meaning of this article is a proceeding where a representative plaintiff seeks to obtain relief on behalf of a group of similarly situated persons, and where the judgment in the action is binding on those persons, irrespective of whether they are actually joined as parties to the case. Generally, a "group action" does not bind absent persons, but instead permits groups of plaintiffs to consolidate their claims in a single proceeding. *See generally* Richard O. Faulk, *The International Class Action: A Commentary on the Geneva Group Action Debates*, 1 CLASS ACTION LITIG. REP. (BNA)) 325, 326-27 (2000) (distinguishing group actions from class actions). There is an unfortunate tendency to confuse these two terms under the general category of "class actions" when they are actually different proceedings. *Id.*

coerce responsible behavior and regulatory compliance, nor is there evidence that current regulations and compensation programs are inadequate to protect personal and public interests. It would require a "revolutionary change in European policy" if these nations' pervasive regulatory mechanisms were declared ineffective in favor of a need for "supplemental regulation through compensation."[5]

Indeed, it appears that the cultures of most democracies, other than the United States, have already determined that tort litigation is not an effective or efficient method to achieve social or personal justice.[6] In those nations, social security systems are the major methods of providing compensation and care for persons who have sustained an injury.[7] Moreover, in most of those systems, the compensation levels are relatively high and the victims are not required to show causation by a particular responsible

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[5] Christopher Hodges, *Multi-party Actions: A European Approach, in* LESSONS FROM THE LAND OF LITIGATION FEVER: SHOULD THE CLASS ACTION BE EXPORTED OR QUARANTINED?, INT'L BAR ASS'N PROC. (Sept. 18, 2000), at 19; *see generally* CHRISTOPHER HODGES, MULTI-PARTY ACTIONS (2001) (discussing European policy toward multiparty litigation).

[6] *See* Hodges, *supra* note 5, at 20 ("Europe neither needs nor wants US-style class action litigation"); *see also* Lord Steyn, *Foreword* to HODGES, *supra* note 5, at v (discussing problems with the use of U.S.-style class actions in Europe and concluding that "[t]he introduction of United States style class actions cannot but contribute to such unwelcome developments in our legal system"); *see generally* Faulk, *supra* note 4, at 326. Significantly, the Commission of the European Communities, after studying the necessity of class actions to improve access to justice, recently concluded that such devices are not appropriate in EC product liability cases. *See REPORT FROM THE COMMISSION on the Application of Directive 85/374 on Liability for Defective Products*, COM(2000)893 final at 27 (concluding that "[a]t this stage, there is no indication that action concerning access to justice specifically with regard to product liability cases would be appropriate"), *available at* http://europa.eu.int/comm/internal_market/en/goods/liability/liability2.htm.

[7] Hodges, *supra* note 5, at 16-17.

person or product.[8] By contrast, the U.S. tort system does not concentrate on predictable and complete compensation, but rather depends upon the subjective judgment of juries to determine liability, causation, and damages. ***1003** Although damages may, in some cases, be extraordinarily high, recoveries are not necessarily so, nor are they ever assured.

Such inconsistency and subjectivity not only increases risk for the litigants, but also imperils the harmonization necessary for international cooperation and business development. In the EC, harmonization of commercial laws and activity is a fundamental goal. Allowing isolated courts to create and enforce their own variable standards, which may or may not be consistent with the considered policies of EC statutes and regulations, undermines the very purpose underlying international economic alliances and political organizations.

Even now, such problems are appearing under treaties where the United States is a party, such as the North American Free Trade Agreement.[9] In some U.S. jurisdictions, litigation pressure on certain products, such as gasoline additives, has prompted states to restrict or ban the use of those products within their borders.[10] Foreign companies that manufacture and distribute the restricted or

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[8] *Id.*

[9] Hereinafter NAFTA.

[10] *See* Richard O. Faulk & John S. Gray, *MTBE: Can the Controversy Be Contained?*, 14 TOXICS L. REP. (BNA)) 603, 607 (1999) [hereinafter Faulk & Gray, *MTBE*]; *see also* Richard O. Faulk & John S. Gray, *Crisis? What Crisis? Containing the MTBE Controversy*, in STOPPING THE SPEEDING LOCOMOTIVE: PERSPECTIVES ON TOXIC TORT AND ENVIRONMENTAL LITIGATION 14 (Richard O. Faulk ed. 2000) (updating Faulk & Gray, *MTBE*); Richard O. Faulk & John S. Gray, *Salem Revisited: Updating the MTBE Controversy*, 2 CLASS ACTION LITIG. REP. (BNA)) 125 (2001) (examining the national and international controversy regarding groundwater contamination allegedly caused by methyl tertiary butyl ether (MTBE), and further updating Faulk & Gray, *MTBE*) [hereinafter Faulk & Gray, *Salem Revisited*].

banned products have made claims for compensation under NAFTA because the states' actions violate the treaty's free trade guarantees.[11] The jurisdiction of the World Trade Organization is also implicated in such a controversy, raising the dispute to global proportions. This example illustrates the perils created by attempts to harmonize commercial relations between unpredictably litigious societies and more stable regulatory democracies. Even policies set through international agreements may be challenged when litigation influences participating states or their subdivisions to take contrary political action. Such disputes are inevitable where the policies of one participating nation, such as the United States, are highly influenced by private litigation, as opposed to uniform regulatory standards.

B. *Incompatibility of Contingent Fee Principles*

The entrepreneurial spirit of contingent fees, a hallmark of U.S. class action litigation that promotes risk taking by the plaintiffs' bar,[12] seems flatly ***1004** incompatible with the fee-shifting tradition of most other nations that discourages litigants and their counsel from taking similar risks. Indeed, outside of the United States, it appears that the international community distrusts litigation as a means for social reform, preferring instead to focus on individual claims and requiring the litigants to take responsibility for asking society's institutions to resolve their personal disputes. This is shown

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[11] Faulk & Gray, *MTBE, supra* note 10, at 607; Faulk & Gray, *Salem Revisited, supra* note 10, at 127.

[12] *See* Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 262 n.257, 288-90 (1992) ("[T]he primary actor in the American class action is the class lawyer pursuing significant fees."); *see also* John C. Coffee, Jr., *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 678 (1986) ("[O]ur legal system has long accepted, if somewhat uneasily, the concept of the plaintiff's attorney as an entrepreneur who performs the socially useful function of deterring undesirable conduct.").

by the prevailing "loser pays" requirement in non-U.S. jurisdictions. This rule typically requires unsuccessful litigants to bear major portions of their opponents' legal expenses. The "loser pays" principle facilitates judicial administration by discouraging the filing of weak cases and by encouraging early settlements before costs escalate.

Although contingent fees have been accepted in a few common law and civil code nations, such fees are disallowed elsewhere.[13] Contingent fees, like legal aid programs, supposedly enhance consumers' access to justice by enabling poorer litigants to pursue claims without the intimidation of attorneys' fees. Unfortunately, this altruistic principle has not proven uniformly effective when applied in progressive social welfare states. In the United Kingdom, for example, the "loser pays" rule was originally suspended in cases where the plaintiff participated in a legal aid program. Although litigation proliferated, so did the number of questionable claims and the costs associated with handling them.[14] Ultimately, the number of persons actually helped by the system declined dramatically.[15]

More importantly, as in U.S. class actions, a practice arose known as legal aid blackmail, where defendants, who could expect reimbursement in other types of cases, were forced to settle weaker claims that might not have been filed previously, or that would have been tried to judgment under the "loser pays" rule.[16] To correct this injustice, the United Kingdom has now restored the "loser pays" rule and now generally applies the rule to contingent fee cases. Parties may purchase private insurance to cover the risk, but they remain primarily liable for their opponents' costs if their case fails.

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[13] *See generally* William J. Lynk, *The Courts and the Market: An Economic Analysis of Contingent Fees in Class Action Litigation*, 19 J. LEGAL STUD. 247 (1990).

[14] *See generally* Hodges, *supra* note 5, at 9.

[15] *Id.*

[16] *Id.* at 12.

The United Kingdom's experience with contingent fees illustrates the problem of permitting class action litigation in social welfare societies. Private*1005 litigants, especially tort litigants, can seldom finance class actions without the financial support of their counsel. In most nations, contingent fee agreements are either impermissible or, if permitted, fail to shield the claimant from the burden of paying the opponent's expenses. Hence, society's policy to discourage frivolous claims and to facilitate early settlement, both admirable goals, also discourages aggregating claims to the point where the danger of blackmail arises. In combination with advanced social welfare programs, the "loser pays" rule ensures that injured parties are predictably and consistently compensated by nonjudicial means and that defendants' behavior is controlled by regulations issued and enforced by legislative institutions, which are typically more politically responsive and accountable than courts.

III. ARE CLASS ACTIONS COMPATIBLE WITH CIVIL LAW JURISPRUDENCE?

Long-standing civil law principles militate against the creation and implementation of class action practices. Unlike common law nations,[17] civil law systems[18] generally eschew judicial discretion. Common law legal principles reflect a

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[17] Common law systems exist today in the United States, Great Britain, Ireland, Canada, Australia, and New Zealand, and have "substantial influence on the law of many nations in Asia and Africa." JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE WITH LATIN AMERICA 4 (2d ed. 1985). The traditional date marking the beginning of the common law is 1066 A.D., the year of the Norman Conquest. *Id.* at 3.

[18] The civil law tradition is the dominant legal structure in most of Western Europe, all of Central and South America, substantial portions of Asia and Africa, and "a few enclaves in the common law world (Louisiana, Quebec, and Puerto Rico)." MERRYMAN, *supra* note 17, at 2-3. The tradition dates back to at least 450 B.C., the approximate date when the XII Tables of Roman Law were published. *Id.* at 2.

"preference for pluralism" and "prominence of 'reasonableness'" qualities that are largely foreign to civil law jurisprudence.[19] Unlike the civil law, the common law does not always insist on the "right answer"; instead, only a "reasonable" approach is required, defined as an approach that accepts that a problem has "many reasonable answers."[20] Civil law systems, on the other hand, primarily depend upon specific statutes, regulations, and rules adopted in the parliamentary process and strictly enforced by a relatively inflexible judiciary.[21]

***1006** These differences are exacerbated by the fundamental political variances between parliamentary democracies, and even between sister common law nations, and the U.S. constitutional structure. In the United States, unlike in a parliamentary democracy, lawmaking is not wholly entrusted to any single branch of government. Neither the executive nor the legislative branches completely control the process and, as a result, laws are almost invariably the result of many compromises. U.S. courts, therefore, rather than being charged with finding precise solutions to specific problems, are charged with effectuating compromises, a responsibility that naturally entails acceptance of one reasonable approach over others rejected or accommodated in the legislative process.[22] This hallmark of the U.S. system promotes even greater discretion than the equitable flexibility encountered in other common law jurisdictions. As Professor Christie has noted, "*[t]his is an important philosophical*

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[19] George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 699 (1998).

[20] *Id.; see also* George C. Christie, *Some Key Jurisprudential Issues of the Twenty-First Century*, 8 TUL. J. INT'L & COMP. L. 217, 230 (2000).

[21] MERRYMAN, *supra* note 17, at 23-24, 47 (noting that, consistently with Roman and French legal traditions, written constitutions; specific statutes and decrees; criminal, civil, and commercial codes; as well as international treaties generally constitute the exclusive sources of law in civil law nations, as opposed to judicial precedents).

[22] Christie, *supra* note 20, at 230.

difference which the proponents of the globalization of law cannot afford to ignore."[23]

Rule 23 of the Federal Rules of Civil Procedure, the U.S. rule governing class actions arising from mass torts, is laced with deference to judicial discretion.[24] This is not surprising because the rationale for class actions originated in courts of equity.[25] U.S. class action jurisprudence originated with a noble vision, namely, to equitably resolve large controversies involving large numbers of persons who have common claims against common defendants. In early experience, persons with small claims, which individually could not be efficiently litigated, typically held the common claims. Class actions gave small claimants an opportunity to recover damages from defendants who, in the absence of a class remedy, would be unjustly enriched by retaining an

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[23] *Id.* at 223 (emphasis added).

[24] According to Professor Cappalli, the broad discretionary powers conferred by Rule 23 effectively transform the American class action judge into "the manager of a small welfare-type bureaucracy whose purpose is to determine and distribute entitlements to a beneficiary group." Cappalli & Consolo, *supra* note 12, at 262 n.261.

[25] Courts of equity or chancery were originally created in England to vary the strict operation of the law "in the interests of fairness." Eventually the courts of law and courts of equity were merged into a single common law tradition that consists of the original common law "and the tempering influence of equity." Comparative law scholars have remarked that the modern civil law is "what the common law would look like if there had never been a court of chancery in England." MERRYMAN, *supra* note 17, at 50-51.

aggregated ill-gotten gain.[26] Even the most recent cases have underscored the importance of this equitable goal.[27]

***1007** Essentially, therefore, class actions were designed first, in the interests of equity, *to promote the filing of litigation that would otherwise never be prosecuted.* They were allowed because, as a matter of policy, wrongdoers should not be allowed to reap unscrupulous gains from multitudes of victims who, without the class device, would probably forgo claims for relief in court because their losses were relatively small. While individual amounts in controversy remained relatively small, this jurisprudence clearly served the purpose of precluding unjust enrichment. Unfortunately, these relatively altruistic concepts carry within them seeds of abuse: the potential to proliferate litigation and the tendency to exaggerate the significance and merits of claims.[28] In such cases, courts face a "fundamental

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[26] *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

[27] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.")).

[28] *See generally* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 438 (Tex. 2000) ("Aggregating claims can dramatically alter substantive tort jurisprudence. Under the traditional tort model, recovery is conditioned on defendant responsibility. The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. By removing individual considerations from the adversarial process, the tort system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, '[c]lass certification magnifies and

dilemma" that requires them to "balance the harm caused by court-sanctioned solicitation of claims" against the "benefits of increased law enforcement through realistic compensation of private attorneys and economic leverage for small claims."[29]

From this underlying equitable rationale, U.S. class action jurisprudence arose that broadly supported early and easy class certification, and that placed defendants under significant pressures to settle.[30] In order to promote*1008

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strengthens the number of unmeritorious claims.'") (citing Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)); *see also* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1010-11 (1995); Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022, 1023-24 (1995) (each observing that mass tort cases have a tendency to attract many unmeritorious claims). In short, "[i]f claims are not subject to some level of individual attention, defendants are more likely to be held liable to claimants to whom they caused no harm." *Bernal*, 22 S.W.3d at 438.

[29] 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 23 App.100 (3d ed. 1999).

[30] Relying on this jurisprudence, which was developed to empower litigants with small claims, many courts in the United States made overreaching decisions that were supposedly consistent with traditional class action principles. Examples from a single jurisdiction, Texas, illustrate the situation that occurred nationally. *See, e.g.*, St. Louis Southwestern Ry. Co. v. Voluntary Purchasing Groups, Inc., 929 S.W.2d 25 (Tex. App. 1996) (Class certification should be resolved as soon as practicable after the action is filed and the determination may be made solely on the basis of the pleadings.); Microsoft Corp. v. Manning, 914 S.W.2d 602 (Tex. App. 1995) (When considering class certification at such an early stage, before supporting facts are fully developed, the court should favor maintaining the suit as a class action because the court may always modify or decertify the class later.); Life Ins. Co. of the Southwest v. Brister, 722 S.W.2d 764 (Tex. App. 1989) (Plaintiffs are not required to prove a prima facie case of liability to secure class certification and the probability of their success on the merits is not relevant to the class certification issue.); *Microsoft*, 914 S.W.2d at 615 (To the extent that the court hears evidence at the class certification hearing, the rules of evidence do not apply. In particular, the court may base its conclusions on

the policies against unjust enrichment, procedural rules were promulgated in the United States that granted broad discretion to trial judges. Both trial and appellate courts construed the class action rule liberally. Even on appeal, class certifications were typically reviewed under a liberal abuse-of-discretion standard. A trial court abuses its discretion only when it acts arbitrarily or unreasonably, or without reference to any guiding principles.[31] Under this standard, certification must be affirmed even if the evidence adduced at the hearing is severely conflicted.[32]

Given the equitable origins of class actions, it is understandable that Rule 23 does not specifically address many of the problems that contribute to class action abuse. Arguably, some problems are broadly encompassed in their wording, but the effectiveness of these factors, standing alone, can only be judged by experience, and experience demonstrates that the rule is not sufficiently specific to predictably preclude the abuses described in this article.[33] As

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evidence that may be inadmissible at trial, even if the supporting proof fails to satisfy admissibility standards for scientific evidence.); *id.* at 613 (The scope of a class may, under appropriate circumstances, be national in scope and variations in state law across the nation do not necessarily preclude certification of national classes, especially if the party opposing the class fails to establish that the variations will render the case unmanageable.). Under the laws of some states, unnamed class members are not considered parties for the purpose of discovery after a class is certified. *See, e.g.*, TEX. R. CIV. P. 42(f).

[31] *See, e.g.*, Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985).

[32] *See, e.g., Microsoft*, 914 S.W.2d at 607; Vinson v. Tex. Commerce Bank, 880 S.W.2d 820, 823 (Tex. App. 1994).

[33] *See generally* Richard O. Faulk & Kevin L. Colbert, *Reforming an Abusive System: Curtailing Class Certification in Toxic Tort and Environmental Litigation*, 11 TOXICS L. REP. (BNA)) 241 (1996), *reprinted in* STOPPING THE SPEEDING LOCOMOTIVE: PERSPECTIVES ON TOXIC TORT AND ENVIRONMENTAL LITIGATION (Richard O. Faulk ed. 2000) (examining the historical

class action jurisprudence developed in the United States, and as mass tort controversies proliferated, most notably asbestos litigation, the courts became less sensitive to the equitable underpinnings of class actions as a safeguard against unjust enrichment and developed another rationale, the judicial economy served by aggregating thousands of claims into a single proceeding.[34] According to these courts, there was simply no ***1009** alternative to class certification to efficiently and effectively manage these massive controversies.[35] Once judicial economy became the overriding consideration, Rule 23's lack of specificity exacerbated the problem by permitting trial courts to exercise broad discretion to certify cases merely on the allegation of a mass tort crisis, instead of requiring proof that such a controversy actually existed or that the claims had any demonstrable merit.[36] This practice resulted in uninformed

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progression of class action abuse in the United States and proposing reforms to preclude blackmail situations in mass tort cases).

[34] Faulk & Colbert, *supra* note 33, at 247-48. The individual claims involved in mass tort actions are rarely impractical to litigate economically. In an alleged class seeking lifetime medical monitoring costs or property value diminutions, the individual amounts in controversy may easily exceed $100,000. If personal injury and death causes of action are added, the individual claims may exceed $1,000,000. Given these amounts of alleged damages, it seems clear that any injured party has a strong incentive to litigate. The original underpinnings of the class device, avoidance of unjust enrichment, are vitiated in this situation. It is unnecessary to promote or foster litigation through a class action in these circumstances. *Id.* at 242.

[35] This evolution was not swift, but rather occurred after a long series of decisions that rejected many other creative methods to deal with the asbestos controversy. *See generally id.* at 247. Indeed, the first federal appellate court to permit an asbestos mass tort class action explicitly did so only out of necessity. *Id.* Thereafter, however, the use of class actions in mass tort cases expanded throughout the United States until the very same court emphasized the importance of a showing of necessity and predictability as a prerequisite to class certification of such controversies. *See* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *see generally* Faulk & Colbert, *supra* note 33, at 248.

[36] Faulk & Colbert, *supra* note 33, at 249-50.

certifications that created gigantic controversies that placed defendants under such intolerable settlement pressures that they were termed "judicial blackmail."[37] This pattern of abuse not only promoted the creation of artificial controversies, but also motivated the resolution of those controversies on economic grounds, rather than on their merits.

The movement to correct these abuses in the United States has taken many approaches, but the actual and proposed reforms generally have a single common objective, namely, the restriction of trial court discretion. From the judicial perspective, the trend of the reforms, either through judicial action or rulemaking, is to limit the exercise of discretion by setting more specific certification standards that require a rigorous analysis and that limit the discretion formerly held by the trial courts to certify first and ask questions later.[38] From a rulemaking perspective, proposals

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[37] *See, e.g.*, *Castano*, 84 F.3d at 746 ("In the context of mass tort actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards. In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. *These settlements have been referred to as judicial blackmail.*") (citations omitted) (emphasis added); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995) ("With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of [an] industry is to follow the asbestos manufacturers into Chapter 11 [bankruptcy proceedings].").

[38] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). In *Amchem*, the U.S. Supreme Court emphasized the importance of carefully scrutinizing the standards to ensure that the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. As a result of these decisions and principles, the current trend in the federal

were made ***1010** to incorporate the judicial reforms into Rule 23 as specific guidelines for certification proceedings.[39] Even so, the restricting case law and the proposed reforms stress the importance of experience gained through trials and appeals of individual claims to determine whether a mass tort is sufficiently "mature" to have the "persistent vitality" necessary for class certification. [40] As a result, they still call for the exercise of broad discretion, restricted only by a

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and state judiciary requires courts to perform a "rigorous analysis" before ruling on class certification to determine whether all prerequisites to certification have been met. *See* Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982); *see also In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1078-79 (6th Cir. 1996). A cautious approach to class certification is now essential in many jurisdictions. *See, e.g.*, Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425 (Tex. 2000). As the U.S. Supreme Court stressed in *Amchem*: "[C]ourts must be mindful that the rule as now composed sets the requirements they are bound to enforce .... The text of [the] rule ... limits judicial inventiveness." *Amchem*, 521 U.S. at 620; *see also* Gen. Motors Corp. v. Bloyed, 916 S.W.2d 949, 954 (Tex. 1996) (emphasizing "the importance of the trial court's obligation to determine that the protective requirements of [the class action rules] are met").

[39] *See, e.g.*, Faulk & Colbert, *supra* note 33, at 249-50 (setting forth specific proposals to amend Rule 23 to provide more specific guidance for trial court discretion). The amendments proposed in that article are set forth in the Appendix hereto. *See also* Darren M. Franklin, *The Mass Tort Defendants Strike Back: Are Settlement Class Actions a Collusive Threat or Just a Phantom Menace?*, 53 STAN. L. REV.. 163, 182-89 (2000) (describing the official proposed amendments to Rule 23).

[40] Professor Francis McGovern first proposed the concept of "maturity" as a prerequisite to certifying American mass tort class actions. *See generally* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989); *see also* Richard O. Faulk & Robert E. Meadows, *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH. L. REV. 779, 786-88 (1998). Generally, the concept permits class certification of a mass tort controversy only when there has been a sufficient history of trials and appeals to justify a conclusion that a real judicial crisis involving meritorious cases exists. *Id.* The concept has been embraced in a number of federal decisions. *See, e.g., Castano*, 84 F.3d at 734. The principle is also enshrined in primary reference materials for U.S. judges. *See* MANUAL FOR COMPLEX LITIGATION § 33.26 (3d ed. 1995).

requirement that the discretionary decision be informed by real historical experience, rather than based upon speculation.[41] They do not purport to divest the courts of discretionary power in the class certification process, but rather confine the exercise of discretion to circumstances where there is adequate information to determine whether a proposed class action will truly satisfy the Rule 23 requirements.

Even this restricted discretion, however, goes far beyond the authority of most civil law judges. In civil law nations, judicial service is a bureaucratic career, and the judge's function is narrow, mechanical, and relatively uncreative.[42] As Professor Merryman, a leading American comparative law scholar, once explained:

> ***1011** [The civil law judge] is a kind of expert clerk. He is presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case. His function is merely to find the right legislative provision, couple it with the

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[41] Rule 23 remains a "flexible" rule, but its criteria must be more carefully applied. *See, e.g.*, *Falcon*, 457 U.S. at 160 (The "flexibility" of Rule 23 "enhances the usefulness of the class-action device[, but] actual, not presumed, conformance with [the Rule] remains ... indispensable.").

[42] *See* Cappalli & Consolo, *supra* note 12, at 291 (The Euro-Continental judge "is profoundly different both in his role in the legal system as a type of state bureaucrat and in his relatively passive role in the legal process, notwithstanding the frequent references to his 'inquisitorial' powers in preparing a case on the facts."); *see also* MERRYMAN, *supra* note 17, at 38 ("[J]udicial service in the civil law countries is a bureaucratic career; the judge is a functionary, a civil servant; the judicial function is narrow, mechanical, and uncreative."); Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 INT'L LAW. 51, 62 (1998) ("[I]n contrast to the rigorous analysis that characterizes the application of U.S. law before an American court, civil law analysis usually consists in the mere mechanical application of the law.").

> fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to follow the formal syllogism of scholastic logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.[43] This *deductive* reasoning approach is the antithesis of the U.S. common law tradition, which uses *inductive* reasoning to resolve legal issues, inferring general principles of law from specific principles found in the federal and state constitutions, statutes, and prior judicial decisions.[44] The difference between these approaches cuts at the very heart of the dichotomy between the two traditions.[45]

As the great American jurist Oliver Wendell Holmes wrote, "[t]he life of the [common] law has not been logic: it has been experience."[46] Consistent with the American tolerance for compromise and degrees of indeterminacy, Justice Holmes recognized that, under the common law, "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices that judges share with their fellow-men,

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[43] MERRYMAN, *supra* note 17, at 36; *see also* Giesze, *supra* note 42, at 61 ("Given the traditional lack of equitable interpretive powers in the civil law system, contemporary civil law judges and lawyers are trained during their formative years to become strict constructionists of the law in accordance with a scientific approach to jurisprudence. They must literally interpret and strictly apply legal principles in accordance with deductive reasoning techniques, doctrinal writings, and legal dogma. Reliance on simple common sense, derived from daily human experiences, generally does not form part of the civil law analytical framework.").

[44] *See* James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEX. L.J., 85, 87-88 (1993).

[45] *Id.*

[46] OLIVER WENDELL HOLMES, THE COMMON LAW AND OTHER WRITINGS 1 (1881).

have a good deal more to do than the syllogism in determining the rules by which men should be governed."[47] U.S. courts are highly flexible and largely rely upon common sense, based on the reasonableness derived from the compromises inherent in the U.S. political structure, as the linchpin of their analysis.[48] This flexibility is derived from the broad discretionary and equitable powers traditionally granted to common law judges to resolve controversies.[49]

*1012 In civil law nations, however, the syllogism rules. Once the question is cast in syllogistic form, the result follows with "inescapable necessity" because "there is no room for discretion when logic is compelling."[50] Civil law judges may not make decisions based upon social values or comparative costs and benefits unless such an approach is specifically authorized by statute.[51] This limitation is critical to the structure of civil law societies, where legislative bodies, rather than judges, are entrusted with the

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[47] *Id.*

[48] *See* MERRYMAN, *supra* note 17, at 37-38, 50-51.

[49] *Id.* ("As to judicial discretion, common law judges traditionally have equitable powers; they can mold the result in the case to the requirement of the facts, bend the rule where necessary to achieve substantial justice, and interpret and reinterpret in order to make the law respond to social change .... Hence the common law judge is less compelled by prevailing attitudes to cram the dispute into a box built by the legislature than is his civil law counterpart. Even when the case involves the application of a statute, the common law judge has some measure of power to adjust the rule to the facts."); *see also* Giesze, *supra* note 42, at 92 n.78 ("Unlike her civil law counterpart, a U.S. common law judge would not be hamstrung by the absence of statutory law, because she possesses inherent equitable powers to interpret statutes.").

[50] ATHANASSIOS N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM 89-90 (1977); *see also* Smith, *supra* note 44, at 87-88 ("To paraphrase Holmes by inversion, the life of the civil law has not been experience but logic.").

[51] *See* Cappalli & Consolo, *supra* note 12, at 291-92.

responsibility of resolving large economic and political issues affecting social welfare.[52]

Limits on judicial discretion have deep roots in the civil law tradition, where revolutionary societies distrusted independent judiciaries, preferring instead to concentrate lawmaking power in parliamentary bodies that were viewed as more responsive and accountable to popular opinions.[53] Given these limitations on discretionary authority, the modern civil law judge "would be absolutely unable to execute, in credible fashion, the same functions as an American judge" in presiding over a proposed class action.[54] If civil law judges lack sufficient discretion to apply certification standards fairly, and if they lack the administrative authority to supervise a certified class action effectively, they certainly lack the discretion necessary to implement the protections necessary to avoid class action abuse.

Indeed, transplanting class action practice into such a rigid system may even increase the risk of abuse, however well intentioned the civil law judiciary might be. Although stricter guidance for judges can certainly protect against abuses, unyielding allegiance to inflexible standards may create even greater dangers. In the more flexible atmosphere of the common law, experience has shown that class certification has a major impact on substantive***1013** law by magnifying personal principles into general societal

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[52] *Id.*

[53] The drafters of the Napoleonic Code of 1804 believed that judicial corruption was one of the principal causes of the French Revolution, and to avoid past abuses, they drafted the Code to curtail judicial discretion. *See generally* MERRYMAN, *supra* note 17, at 14-18, 29-30, 36. The fundamental distrust of unrestrained judicial discretion underlies the structure of most civil law judicial systems. *See* Giesze, *supra* note 42, at 92 n.62; *see also* Smith, *supra* note 44.

[54] *See* Cappalli & Consolo, *supra* note 12, at 291.

concerns.[55] Aggregation in civil law systems may have similar effects. As Professor Edward Cooper has observed:

> Class action devices will change the real-world effect of some existing substantive laws, and it may be difficult to predict which laws will be the most affected. Some substantive laws have little meaning because little enforced. Providing an efficient procedural tool that leads to widespread enforcement changes, and [sic] may transform, the social, political, and economic reality. Not everyone will be pleased.[56] Moreover, even without juries, many are concerned that aggregating tort claims enhances their significance and value beyond the range normally allowed in foreign systems. There are concerns that the size of awards will necessarily increase with the perceived magnitude of their impact on large numbers of plaintiffs.[57] Other voices raise concerns that the difficulty of apportioning and allocating compensatory damages between mass tort plaintiffs will lead to de facto awards of punitive damages, which are typically not allowed outside the United States, especially in civil code jurisdictions. As Judge Dag Bugge Norden of Norway remarked at a recent conference, "it is sometimes easier to figure out what the culprit is supposed to pay than to calculate how the injured should be compensated."[58]

It is, of course, impossible to foresee precisely what principles and policies may be magnified, or restricted, by class certification in civil law cultures. Civil law jurists strictly adhering to traditional methods certainly have greater potential to create such results than do common law judges

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[55] *See* authorities cited *supra* notes 28 and 37.

[56] Edward H. Cooper, *Class Action Advice in the Form of Questions*, 11 DUKE J. COMP. & INT'L L. 215, 219 (2001).

[57] *See* Faulk, *supra* note 4, at 326.

[58] *Id.* at 326-27.

who may exercise precautionary discretion to avoid them. Inflexible aggregate enforcement may transform laws into major weapons of social policy in ways that their drafters never envisioned. Civil law countries with no culture of using litigation as a tool for public policy may find themselves swamped by progressive litigants who resort to the courts to achieve social change instead of using the traditional parliamentary process. This concern deserves close attention in civil law societies, where "unlucky drafting is not easily cured by judicial creativity and ... mistaken choices are not readily cured by amendment."[59]

Even if civil law courts had the discretionary power to certify and manage class actions, they lack the institutional safeguard of stare decisis essential ***1014** to the common law tradition.[60] As a result, they are not structured to implement the lessons learned as mass controversies mature through individual trials and appeals.[61] The bias against stare decisis is inherent in the political structure of civil law nations,[62] and is a basic axiom in the legal education of their lawyers and

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[59] Cooper, *supra* note 56, at 222.

[60] *See* MERRYMAN, *supra* note 17, at 47 (Judicial decisions "are not a source of law" in the civil law tradition. "It would violate the rules against judicial lawmaking if decisions of courts were to be binding on subsequent courts.").

[61] From a historical perspective, it is not surprising that stare decisis, which has its origins in equitable considerations, is foreign to civil law jurisprudence, which does not recognize equitable considerations in judicial analysis. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (partially deriving American rule of stare decisis from the Court's equitable powers).

[62] In some nations, such as Chile, stare decisis is even forbidden by constitutional mandate. *See* Giesze, *supra* note 42, at 92 n.71. Under the civil law, the absence of stare decisis is seen as necessary "to ensure that questionable judicial decisions grounded on literal statutory construction do not disrupt the delicate balance of power in the civil law tradition." *Id.* at 62. Of the civil law nations, Mexico is a notable exception because it permits stare decisis, "jurisprudential obligata," when the Mexican Supreme Court renders five consecutive and consistent decisions involving the same legal issue. *Id.*

judges.[63] Even if civil law jurists were somehow empowered with sufficient equitable discretion to certify and manage class actions, the absence of stare decisis guarantees that protections against abuse fashioned by courts with experience in prior class actions will not be applied consistently. As a result, the jurisprudential memory necessary for handling aggregate controversies will never arise. Litigants will have no assurance that the fairness of one civil law tribunal will not be entirely rejected by another, even if the courts are confronted by similar facts.

Of course, it is entirely possible that adjustments may be made that ultimately resolve the difficult dichotomies between the common law and civil law traditions. At this point, however, reliance on discretion will be difficult in procedural systems that rely on detailed and controlling rules.[64] Although the specific solutions may not be apparent at this time, it seems clear that the U.S. class action practice is ill suited for wholesale export to civil law nations. To the extent that those nations develop devices that permit aggregate resolution of legal controversies, those solutions must emerge from their own unique traditions, not from transplanting the U.S. model to foreign soil.

In that regard, civil law systems do not lack tools for dealing with mass controversies. In certain situations, a private civil proceeding may be annexed to a criminal or administrative case and, upon conviction or resolution of the public matter, a civil court may quantify damages and render *1015 a private judgment for the annexed claimants.[65] When

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[63] *See, e.g.*, J. M. Perillo, *The Legal Professions of Italy*, 18 J. LEGAL EDUC. 274, 277-78 (1966) ("[L]egal education gives [the student] a strong orientation towards scholarly doctrine as opposed to judicial precedent and towards the orthodox dogmatic approach of the academic establishment.").

[64] *See* Cooper, *supra* note 56, at 223.

[65] *See generally* Hodges, *supra* note 5, at 3. Given the civil law tradition's emphasis on regulation and public enforcement as an alternative to

numerous private claims are involved, civil courts may appropriately consolidate the claims and select one or more claims as a model claim for individual attention. The court may then use the model claim to guide its inquiries and decisions on the remaining cases similarly to a nonbinding bellwether trial under U.S. practice.[66]

Many nations now permit group actions that allow multiple claimants to aggregate their causes of action and that enable them to pursue those claims in a single forum.[67] Generally, these suits are designed to vindicate diffuse public interests such as consumer protection, unfair competition, and false advertising, instead of individual rights.[68]

These group actions are not truly class actions within the American understanding of the term. In group actions, the plaintiffs must affirmatively join the case and agree to be bound by the result. Joinder can be accomplished in varying ways, such as being a member of an association that is named as the plaintiff, or by transferring the individual claimants' rights to a named representative. Typically, these cases do not allow a party to be impressed into the case involuntarily, as in U.S. class actions, subject only, in some instances, to a

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private litigation, this paradigm is an excellent compromise because it enables coordinated private claims when a defendant is found publicly responsible. Contrary to the U.S. class actions paradigm, it permits aggregation only upon a prior finding that the defendant's conduct violated legitimate public interests. *See id.* ("This model also suggests a different balance between control of behavior by regulation and compensatory liability than has developed in, notably, [the] USA.").

[66] *See* Faulk & Meadows, *supra* note 40 (collecting and reviewing authorities regarding the use of bellwether trials of selected plaintiff groups in U.S. mass tort cases).

[67] *See* Hodges, *supra* note 5, at 22-24; Miguel Angel Fernandez, *Class Actions in Spain?, in* LESSONS FROM THE LAND OF LITIGATION FEVER: SHOULD THE CLASS ACTION BE EXPORTED OR QUARANTINED?, INT'L BAR ASS'N PROC. (Sept. 18, 2000), at 5-6.

[68] *See* Cappalli & Consolo, *supra* note 12, at 264 n.270 (discussing distinction between "diffuse" and "differentiated" interests).

right to opt out. This distinguishing characteristic of the U.S. class device is generally unavailable under group action procedure. Moreover, many states restrict the utility of the group action to injunctive proceedings, as opposed to suits for money damages.[69] As a compromise aggregation device, the group action offers many of the advantages of aggregation, while avoiding many of its oppressive pitfalls. It remains to be seen, however, whether civil law jurists can handle such complex controversies effectively, especially if the cases are expanded into the mass tort arena.

*1016 IV. INTERNATIONAl class actions and global liabilities

A. *International Class Actions in U.S. Courts*

Although recent judicial decisions have taken giant steps toward returning U.S. class action litigation to the noble aspirations of its origins, much more work is required before the fallacy of judicial economy is completely banished from certification deliberations. Efforts to amend the rules of procedure to incorporate these judicial reforms have generally failed, with the single exception of allowing a discretionary interlocutory appeal from class certification in the federal courts.[70] Moreover, the state courts' attitudes toward class certification vary considerably, from those that abide by the traditional judicial economy approach, to those that apply the narrower perspectives of some federal circuits.[71] As a result, class action litigation in the United

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[69] *See* Jan van Dunné, *Class Actions: A Continental View of the American Cathedral, in* LESSONS FROM THE LAND OF LITIGATION FEVER: SHOULD THE CLASS ACTION BE EXPORTED OR QUARANTINED?, INT'L BAR ASS'N PROC. (Sept. 18, 2000), at 3.

[70] *See* FED. R. CIV. P. 23(f).

[71] *See generally* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425 (Tex. 2000) (examining competing lines of authority in various jurisdictions); *see also* Richard O. Faulk, *The Florida Tobacco Class Action Verdict: Can It Happen in Texas?, available at*

States is now characterized by forum shopping, where plaintiffs' counsel carefully select those jurisdictions where courts have the broadest discretion in class certification and management.[72] Hence, the controversy rages on and the problems of abuse remain unresolved. For defendants stranded in jurisdictions where discretion reigns supreme, "judicial blackmail" remains a real possibility.

The blackmail threat of U.S. class action litigation, as U.S. courts use that term, has already been felt outside the borders of the United States. The most obvious examples, cases seeking class recoveries by Holocaust survivors and workers impressed into slave labor by Nazi Germany, have already had their desired effects. For example, even though the slave labor class claims have, to date, proved unsuccessful in U.S. courts,[73] the German government recently orchestrated and implemented a comprehensive settlement of the controversy and, in the process, provided for billions of marks to be paid to laborers and millions of dollars to be paid to U.S. class action lawyers. Germany created a special foundation that will pay up to $5 billion in compensation from a fund comprised of contributions from government and industry. The agreement was delayed by "haggling over how much of the foundation's money should be paid to the American lawyers, who were hoping to secure large contingency fees, as is customary ***1017** in class-action suits."[74] Attorney payments were ultimately capped at $50

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http://www.gardere.com/newsimages/Tobacco.pdf (last visited Mar. 11, 2002) (comparing Florida and Texas class action procedures).

[72] Faulk, *supra* note 71 (noting that the procedure that permitted the $145 billion class action verdict against the tobacco industry is not available in Texas).

[73] *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (slave labor claims raise nonjusticiable political questions that were entrusted to other branches of government responsible for the political settlement of wars and the payment of reparations).

[74] William Drozdiak, *Germany Sets Fund for Slaves of Nazis; $5 Billion Will Go to Aging Survivors*, WASH. POSTT, July 18, 2000, at A17.

million, with two arbiters selected "to make sure that any legal fees would not be exorbitant."[75] Unfortunately, the victims themselves will only recover between $2,500 and $7,500 each.[76]

It would be naive to presume that the threat of U.S. class actions was not a major factor in the German government's decision. These claims have jeopardized German business activities even outside the context of the litigation, such as the merger between Bankers Trust, the U.S. investment bank, and Deutsche Bank AG. Similar class action claims are currently pending against numerous Austrian companies.[77] The Austrian Parliament recently approved a compensation fund exceeding $400 million to partially resolve the U.S. class action claims. [78] Apparently, neither the German or Austrian governments nor their various defendant industries have any intention of seriously defending the U.S. class actions in court, irrespective of their apparent lack of legal merit, in view of the social, political, and moral pressures engendered by the lawsuits' allegations. Even more recently, IBM, a global enterprise headquartered in the United States, was sued in a New York federal court for its alleged involvement in supplying data management tools that allegedly facilitated the Holocaust. [79]

Although the Nazi-era claims raise particularly heinous allegations, it is not difficult to foresee how other allegations,

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[75] *Id.*

[76] *Id.*

[77] *See* Konstantin Richter, *Settlement of Nazi-Era Claims in Austria Remains Elusive*, WALL ST. J. EUR., July 28, 2000, 2000 WL-WSJE 21067337; Christopher Rhoads, *Breuer Seeks Resolution of War Claims*, WALL ST. J. EUR., Feb. 8, 1999, 1999 WL-WSJE 5507037.

[78] *See* Richter, *supra* note 77. The fund will not completely resolve the suits because the U.S. class action lawyers will only drop the claims "if the slave-labor agreement includes a firm commitment to set up a similarly extensive solution for restitution of Jewish property." *Id.*

[79] *See generally* John O'Sullivan, *IBM's Hands Are Clean*, CHI. SUN-TIMESESSSS, Feb. 13, 2001, at 29.

such as those arising from mass torts, might produce similar results. In a real sense, these cases have transformed the U.S. class action into an international proceeding, thereby allowing U.S. private litigation to affect business and personal activities far beyond the borders of the United States, even though the affected cultures might never empower their own courts to exert similar influences.

Presently, the power of these international class actions is primarily exerted through moral, political, and diplomatic pressure. Although it is questionable whether U.S. class action judgments are actually enforceable against defendants' assets located outside the United States, the adoption of U.S.-style class action rules by other nations may render such judgments enforceable, at least in part. If such rules are adopted, foreign defendants ***1018** may no longer be able to resist enforcement by arguing that the U.S. class action is fatally dissimilar and fundamentally contrary to their homeland's judicial procedures[80] and public policies.[81] Indeed, even without formal adoption of class action principles in other nations, U.S. class action awards soon may be rendered enforceable by treaty. For example, the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters might ultimately permit enforcement, a critical agreement that has, to date, not been approved.

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[80] EC courts have refused to enforce foreign judgments that are contrary to their own procedural rules. *See* Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 47 (1996) (discussing French courts refusing to enforce foreign judgments that are not accompanied by written reasons).

[81] *Id.* (discussing German federal court decision refusing to enforce portion of U.S. judgment that awarded punitive damages as contrary to German public policy). The German federal court decision was criticized in Europe for going too far because although it disallowed the punitive award, the court enforced a $200,000 award for pain and suffering that was "for Europeans, an unbelievably high amount." *Id.* The possible enforcement of thousands of such awards from an enforceable U.S. mass tort judgment creates a palpable "judicial blackmail" scenario.

If U.S. class action judgments become enforceable against non-U.S. assets, can there be any doubt that entrepreneurial American lawyers will attempt to transform the United States into the "Courthouse for the World"? Under such a scenario, the long arm of American justice may reach out to impact business practices on a global basis, thereby depleting the coffers, and regulating the conduct of any entity doing business in the United States, irrespective of where the entity's coffers are located. The global consequences of this strategy should not be underestimated. If sovereign states, such as Germany, are currently bowing to U.S. class action pressures even without existing enforcement mechanisms, the threat of *collectible* judgments may prove overwhelming.

The political impact of enhancing the power of American jurisprudence in this manner is nothing less than imperialistic. Accordingly, any reforms that permit the proliferation of the class device, either procedurally or through enforcement of U.S. class action judgments, should be carefully scrutinized. Proposed reforms should be evaluated to ensure that by superficially enhancing access to justice, the reforms do not surrender currently exempt assets to a system that ultimately denies justice by exploiting the blackmail of oppressive aggregation. Persons doing business in the global marketplace should consider these risks before prematurely endorsing uniform legal principles and dispute resolution procedures. Otherwise, what are now perceived as global *opportunities* may translate into global *liabilities*, liabilities assessed by U.S. juries and judges in remote forums that may prove utterly insensitive to foreign cultures.

***1019** B. *International Class Actions in Other Nations*

In 1999, the European Commission issued a Green Paper that solicited input regarding possible amendments to

the European Union's Product Liability Directive.[82] One of the major questions raised by the Green Paper was whether the Product Liability Directive should provide for class actions or other types of group actions as special measures to improve access to justice by persons injured by defective products in Europe.[83] Although the European Commission recently decided not to issue a formal White Paper at this time, pending further study,[84] the storm of controversy raised by this suggestion continues to rage. Many member states are considering access-to-justice problems and are proposing and implementing their own solutions. As a result, the EC currently resembles a patchwork quilt of varying class and group action laws and initiatives.[85]

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[82] *See Green Paper: Liability for Defective Products*, COM(1999)396 final, *available at* http://europa.eu.int/comm/internal_market/en/update/consumer/99-580.htm.

[83] *See id.* at 31-33.

[84] *See REPORT FROM THE COMMISSION on the Application of Directive 85/374 on Liability for Defective Products, supra* note 6, at 27 (concluding that "[a]t this stage, there is no indication that action concerning access to justice specifically with regard to product liability cases would be appropriate").

[85] *Id.* at 25-27. The report summarizes the present situation as follows:

> In Portugal, popular legal action exists under which the Public Prosecutor's Office and consumers' organizations can intervene in cases of injury to private individuals.
>
> In Austria, civil procedural rules allow the victim to pass on his/her liability claim to a consumers' association.
>
> In Belgium, plaintiffs with similar but separate claims can institute proceedings before the same court and then ask the court to handle their claims at the same hearing, without joining them.
>
> In Greece, legal action by consumer groups is possible.
>
> In Denmark, the rules on legal proceedings allow popular legal actions to be brought in all consumer-related areas.
>
> In France, legislation exists that enables consumer organizations to defend the civil interests of consumers. This does not, however, include actions for compensation for a group of injured persons.

***1020** Even if a harmonized class action principle is never promulgated, the selective adoption of U.S.-style class action rules by individual nations, such as those in the EC, threatens a barrage of forum shopping by litigants and counsel who seek to create transnational class actions. Since most EC member states do not recognize the doctrine of forum non conveniens, and since those states are also obliged

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Consequently, there are no actions similar to the "class actions" in the United States.

In Germany, in the event of a series of accidents, there is a "trial action" that will subsequently form the basis of compensation between industry and the injured persons.

In Ireland, the rules of court provide a procedure whereby one or more persons having the same interest in a single claim may bring or defend the claim on behalf of all of those interested.

In Italy, consumers' associations can defend consumers' interests, but cannot act on behalf of injured persons.

In Finland, the question of popular legal actions had been examined a few years earlier. The consumer ombudsman can assist individuals before the court; the trial costs can be covered entirely by a special budgetary fund.

In the Netherlands, multiparty action is possible under the Group Actions Act from May 1994.

In Spain, consumers' associations can bring a legal action on behalf of one of its members. An amendment of the rules on court proceedings will make it possible to bring joint actions, as from January 2001.

In Sweden, rules concerning popular legal actions are being considered, and a proposal might be put forward in the future (noting that a U.S.-style class action proposal is pending and likely to be adopted).

In the United Kingdom, multiparty actions can be brought in the courts in England and Wales under a rule of civil procedure on group litigation. Under this procedure, one or more individuals can act in a representative capacity and bring proceedings on behalf of others where they have the same interest.

Id. at 26-27 (footnote omitted).

to enforce judgments rendered by the courts of sister EC nations, the enactment of class action rules by any member state arguably enables class action practice by the citizens of all member states within the borders of a single forum. Such a development is already imminent in Scandinavia, where a Swedish proposal, in the guise of promoting greater access to justice by large groups of injured parties, threatens all of the evils inherent in the U.S. class action experience on a trans-European scale.

Certain Scandinavian civil code countries, such as Sweden and Finland, appear to be more favorably disposed toward the U.S. class action model, at least in consumer cases where large numbers of persons with small claims aggregate their claims to rectify a wrong that might otherwise go unredressed. In Sweden, for example, work has proceeded on a class action act since at least June 1999, and a revised statute is expected to be introduced in 2001. The act's supporters believe that the social and legal differences between Sweden and the United States provide adequate safeguards against abuse and the blackmail effect of aggregating mass claims against defendants.[86] The proposed Swedish act incorporates most of the major components of Rule 23, but requires only common issues, not a predominance of such issues, and allows the class action to proceed without a formal certification.[87]

Although it appears that the Swedish act may be enacted, its opponents stress several important objections. For example, it appears that the Swedish statute will permit

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[86] *See generally* Robert Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, The Need for Reforms, and a Forthcoming Proposal*, 11 DUKE J. COMP. & INT'L L. 381 (2001); *see also* Per Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805 (1997).

[87] *See* Nordh, *supra* note 86, at 395-402; Lindblom, *supra* note 86, at 824-30.

class counsel to enter into fee agreements that enhance their compensation if they prevail, agreements that, although subject *1021 to court approval, strongly resemble contingent fees.[88] The opponents are concerned that these entrepreneurial incentives plant the same seeds of abuse that ultimately produced the class action abuse in the United States. More importantly, the opponents stress that the Swedish act, if passed, will burden Swedish courts with countless class actions filed under Swedish procedure against nonresident defendants by classes that include nonresident plaintiffs. In other words, they claim that the Swedish act creates the peril of the trans-European class action in which the courts of one member country assume jurisdiction over controversies that involve and affect citizens throughout the continent.[89]

This scenario may be a real danger. For many years, the trend in Europe has been to expand the scope of jurisdiction over foreign parties. [90] The risks are compounded by Article 22 of the Lugano Convention, which grants jurisdiction over controversies affecting different states to the court in which the first action is filed.[91] Recognition and enforcement of

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[88] The Swedish proposal refers to these arrangements as "risk agreements." Lindblom, *supra* note 86, at 826; *see* van Dunné, *supra* note 69, at 5 ("Agreements with counsel in class action litigation resembling the American contingency fee system, subject to approval, are permitted."); Faulk, *supra* note 4, at 327.

[89] *See generally* Faulk, *supra* note 4, at 327.

[90] *See* John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695, 726-27 (1993).

[91] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *done* Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereinafter *Lugano Convention*]. The *Lugano Convention* was developed to extend the "full faith and credit" system of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to European countries that are not yet members of the EC. *See* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *done* Sept. 27, 1968, 1998

judgments rendered by EC member states is comparable to the regime applicable to sister state judgments under the Full Faith and Credit Clause of the U.S. Constitution.[92] Judgments within the scope of the Lugano Convention are recognized and enforced throughout the EC,[93] and review of the merits of the judgments is explicitly precluded.[94] Indeed, judgments ***1022** rendered in signatory states to the Lugano Convention have *more* "full faith and credit" in sister states than judgments rendered in different U.S. states because, under the Lugano Convention, "the jurisdiction of the court of the State of origin may not be reviewed."[95]

Arguably, if a class action is filed in Sweden under the proposed Swedish act, the Swedish court could acquire complete jurisdiction over the controversy, thereby disenfranchising individual plaintiffs who may prefer to sue elsewhere. This situation would be a strong incentive for forum shoppers. As a general rule, the conventions governing

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O.J. (C027) 1 [hereinafter *Brussels Convention*]. In turn, the *Brussels Convention* arose from a provision in the Treaty of Rome that created the European Economic Community, which motivated member states to facilitate the formalities for mutual recognition and enforcement of judicial judgments. *See* Treaty Establishing the European Economic Community, *done* at Rome, Mar. 25, 1957, art. 220, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EU Official Pub. Off. 1987).

[92] *See* David L. Woodward, *Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom, and the European Economic Community*, 8 N.C. J. INT'L L. & COM. REG. 299, 316 (1983); Arthur Taylor von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 COLUM. L. REV. 1044, 1045-51 (1981).

[93] *See* Fitzpatrick, *supra* note 90, at 705, 722. There are a number of exceptions to this general rule, but only the public policy exception appears arguably applicable.

[94] *Lugano Convention* art. 29 ("Under no circumstances may a foreign judgment be reviewed as to its substance.").

[95] *Lugano Convention* art. 28, para. 4.

jurisdiction and enforcement of judgments in Europe do not distinguish between EC and non-EC plaintiffs. Any plaintiff, regardless of domicile, can bring an action in any member state's courts so long as the relevant convention's jurisdictional provisions are satisfied, and judgments rendered in those actions will be enforced throughout the EC.[96] The risk of extraterritorial class actions is further heightened in view of the trend to expand the "long arms" of European courts through "exorbitant jurisdiction,"[97] and the fact that European courts typically do not recognize the doctrine of forum non conveniens.[98] Indeed, the standards for asserting jurisdiction over non-EC domiciliaries are so much broader than those governing EC citizens that they have been termed discriminatory,[99] and a civil law court in Sweden, or

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[96] *See* Fitzpatrick, *supra* note 90, at 727 n.151.

[97] "Exorbitant jurisdiction" can be defined as an assertion of jurisdiction that is not generally accepted under international legal principles, and is generally analogous to the U.S. Supreme Court's insistence on reasonableness and minimum contacts as a basis for personal jurisdiction. Fitzpatrick, *supra* note 90, at 723 n.137. Insofar as EC domiciliaries are concerned, judgments based upon exorbitant jurisdiction are not enforceable. However, *those same judgments are expressly enforceable against non-EC defendants. Id.* at 724-25; *see also* Schlosser, *supra* note 80, at 22.

[98] Fitzpatrick, *supra* note 90, at 721 (The doctrine is "precluded by the Jurisdiction and Judgments Conventions."); *see also* Schlosser, *supra* note 80, at 22. The doctrine of forum non conveniens was developed to mitigate the effects of unfair assertions of jurisdiction when the defendant's contacts were relatively slight and the inconvenience of the forum was great. *See generally* Dow Chem. Co. v. Alfaro, 786 S.W.2d 674, 676-77 (Tex. 1990) (discussing the origins of the doctrine), *cert. denied*, 498 U.S. 1024 (1991). The doctrine was not recognized in civil law nations because they typically rejected the transient jurisdiction that forum non conveniens was designed to remedy. Fitzpatrick, *supra* note 90, at 721.

[99] Schlosser, *supra* note 80, at 22 ("All civil-law systems have provisions creating jurisdiction over defendants neither residing within the jurisdiction nor having sufficient contact with the court's district that would normally allow specific jurisdiction to be exercised. All these provisions may be characterized as provisions discriminating against foreigners.") (footnote omitted).

in any other civil law nation, is *obliged* to entertain an international class action against non-EC citizens if its jurisdiction is established.[100]

*1023 There are serious and unresolved questions regarding whether another EC member state could refuse to enforce another member state's class action judgment under any of the Lugano Convention's exceptions. Depending on the forum state's attitudes toward aggregation of claims, attitudes that are, to say the least, currently in flux, such a judgment may or may not be contrary to the forum state's public policy.[101] Even then, the public policy test may not be applied to rules relating to jurisdiction,[102] and depending upon how the issue is cast, the enforceability of an extraterritorial class action may be deemed a jurisdictional question. Moreover, since the forum state must evaluate recognition based upon the same findings of fact upon which the original court determined its jurisdiction, there is generally no opportunity to build a different factual record.[103] The problem is compounded further because, in the EC, such a class action judgment must be enforced *even if it is not a final decree*. A judgment that is provisional or preliminary may be enforced even though it may be subjected to modification or appellate review in the originating state.[104] Although such enforcement may be relatively harmless where traditional legal principles are concerned, enforcement of provisional class action judgments precludes the development of experience necessary for a "mature" evaluation of the controversy. As a result, the EC

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[100] *See id.* ("A [civil law] court having jurisdiction is committed to exercise it, because it is a public service entrusted to it by statute. A German or French judge would find it very awkward if he had any discretionary power to decline jurisdiction.").

[101] *See Lugano Convention* art. 27(1).

[102] *Lugano Convention* art. 28, para. 3.

[103] *Id.; see also* Fitzpatrick, *supra* note 90, at 705 n.43.

[104] *See* Schlosser, *supra* note 80, at 30.

enforcement procedure unwittingly facilitates one of the very evils that produced class action abuse in the United States.[105]

Perhaps the greatest problem raised by the Lugano Convention concerns its impact on non-EC domiciliaries sued in EC courts. If the defendant is not domiciled in Europe, there is no uniform jurisdictional test. Instead, the domestic law of the forum state determines jurisdiction. The import of this rule is startling for non-EC defendants sued, for example, under Sweden's proposed class action rule. For such a defendant, *there is no jurisdictional requirement for the recognition and enforcement of class action judgments*, so long as the judgment originates from a member state's courts.[106] Thus, *even if a member state found that enforcement against a non-EC defendant was against its own public policy, the court would be obliged to enforce the judgment*. Thus, the greatest risk from the Swedish proposal is posed to non-EC defendants who are, to say the least, placed in a precarious situation.[107] In its own way, therefore, Sweden and other adventurous EC ***1024** member states may truly become "Courthouses for the World" for class actions

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[105] *See infra* pp. xxx-yyy (discussing the role of "maturity" in mass tort litigation).

[106] *See* Fitzpatrick, *supra* note 90, at 722 & n.132; *see also* von Mehren, *supra* note 92, at 1058.

[107] Michael Bogdan, *The "Common Market" for Judgments: The Extension of the EC Jurisdiction and Enforcement Treaty to Nonmember Countries*, 9 ST. LOUIS U. PUB. L. REV. 113, 129 (1990). Taken to its extreme, the scope of EC member states' jurisdiction over non-EC domiciliaries doing business on the Internet in the global economy is arguably unlimited. Such an argument raises vast concerns that are far beyond the scope of this article, but that must be considered before enacting class action procedures in the EC. *See, e.g.*, Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1217-18 (1998) ("Under standard assumptions about cyberspace architecture, persons can upload or transmit information knowing that it could reach any and all jurisdictions, but not knowing which particular jurisdiction it might reach. Can every state where those transmissions appear assert specific personal jurisdiction over the agent of the information under the purposeful availment and reasonableness tests?").

against foreign defendants over which they assert jurisdiction.

V. CONCLUSION

Class action abuse is a problem that may never be solved satisfactorily. Massive abuses still occur under current rules in the United States, and the reforms to correct the abuses are neither completely enacted nor necessarily sufficient. The diverse attitudes of U.S. state courts create significant opportunities for forum shopping by enterprising plaintiffs' counsel, and gigantic judgments that are precluded by one state's laws are perfectly permissible in other jurisdictions. Although some common law nations, such as Australia and Canada, have embraced and even liberalized American class action jurisprudence, others, such as the United Kingdom, have rejected the concept in favor of more conservative group action procedures. To say the least, the future of class actions in the common law nations remains controversial. As long as the controversy persists, and as long as abuses are permissible, the American paradigm is clearly not suitable for wholesale export to foreign legal systems.

In view of this uncertainty, it is reasonable for civil law nations to approach the concept cautiously. In liberal social democracies where litigation is not valued as a social tool, the necessity of class relief is questionable. For those societies, pervasive regulation and active enforcement by public authorities is typically sufficient to resolve mass controversies, especially when private claims may be annexed to the proceeding and resolved in an ancillary manner. Moreover, civil law traditions, which distrust judicial independence and discourage judicial creativity, are neither conceptually nor culturally suited to exercise the discretion necessary to administer the American class device. Without such a discretionary tradition, inflexible aggregate enforcement will almost certainly magnify the impact of substantive laws far beyond anything envisioned by

parliamentary drafters, and the absence of stare decisis will preclude consistent implementation of safeguards necessary to prevent abuse. These problems suggest that civil law nations considering collective liability paradigms should eschew the American model in favor of devices more compatible with their unique traditions, such as the more conservative group actions.

***1025** The international legal community's infatuation with American class actions masks their most serious evil, namely, the potential extraterritorial impact of their abuses on foreign defendants. Already, as the Holocaust class actions have shown, the threat of American "judicial blackmail" has coerced not only businesses, but also *sovereign states* into gigantic settlements. The willingness of some foreign courts to enforce substantial American tort judgments and the movement toward international treaties mandating international enforcement of American decrees threaten unprecedented judicial imperialism. Furthermore, the selective enactment of U.S.-style class action principles by EC member states threatens not only trans-European class actions against EC domiciliaries, but also *global* class actions against non-EC defendants who are embraced by the expanding, and discriminatory, reach of EC jurisdiction.

Considering these complications, we must remember that the goal of promoting increased access to justice is not achieved by promoting *access* alone. Any system of collective litigation must not only enhance accessibility, but also must ensure the reliable and efficient dispensation of *justice* to all participating parties. Although justice may be a relatively abstract term in some academic circles, and although it may seem an idealistic goal when administrative reforms are discussed, we must never forget that, to the individual, whether plaintiff or defendant, it is the *only* legitimate objective. To the extent that aggregation systems fail to completely appreciate an individual's grievances, and to the extent that such systems unduly influence defendants

to resolve disputes economically, rather than on their merits, such systems deny justice and pervert the fundamental goals of civilized jurisprudence. The potential for perversion will be exponentially enhanced if demonstrably defective devices, such as U.S. class actions, are given extraterritorial dignity or, even worse, grafted onto rigid international systems that are culturally incapable of preventing abuse. Caution, careful deliberations, and a thorough appreciation of cultural differences are therefore essential, lest, by risking Armageddon, we gain not justice, but merely results.

*1026 APPENDIX: PROPOSED AMENDMENTS TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE[108]

This author proposes that Rule 23(b)(3)(A) be amended to require consideration of the interests of members of the class in individually controlling the prosecution or defense of separate actions, *with attention to the nature of the claims asserted by or against the class members, and the type of relief sought, including an evaluation of the amounts in controversy sought by or against individual class members.* In order to preclude "judicial economy" reasoning to certify classes without an adequate litigation history, this author proposes that Rule 23(b)(3)(B) be amended to mandate specific review of the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, *with attention to the experience gained through prior trials of individual claims, the number of those trials, the extent to which the resulting judgments have been reviewed on appeal, and the results of those appeals.* To ensure that variations in state law are adequately

[108] The author proposed the following amendments to Rules 23(b) and 26 of the Federal Rules of Civil Procedure in Faulk & Colbert, *supra* note 33, at 249-50.

evaluated in multi-jurisdictional class actions, to make certain that courts permit adequate discovery for case evaluation, and to require consideration of the procedural impact of class certification in the context of an actual trial, the author proposes that Rule 23(b)(3)(D) be amended to require consideration of the difficulties likely to be encountered in the management of a class action, including: *(i) the nature and extent of discovery necessary to evaluate the claims asserted by or against the members of the class*;

(ii) the manner in which the claims asserted by or against a certified class will be tried; and

(iii) variations of state law underlying the claims asserted by or against the members of the class in actions that seek class certification for individual claims arising under the laws of more than one state. In such cases, the burden shall be upon the party seeking class certification to demonstrate that the burdens and complexities of state law variations do not render the case unmanageable as a class action.

The author also proposes that Rule 26 be amended to incorporate, as an element of certification, a test, akin to preliminary injunction analysis, that balances the probable outcome on the merits against the burdens imposed by class certification.

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APPENDIX V

INSTITUTIONAL SHAREHOLDER SERVICES, "ACCOUNTABILITY GOES GLOBAL: INTERNATIONAL INVESTORS AND U.S. SECURITIES CLASS ACTIONS", (2007), HTTP://WWW.ISSPROXY.COM/PDF/ ACCOUNTABILITYGOESGLOBAL.PDF

Accountability Goes Global
International Investors and US Securities Class Actions

May 2007

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Introduction

In an age when world economies are becoming increasingly interconnected, investors will continue to expand their investment horizons and erode the home county bias that was prevalent well into the late 20th century. These cross-border flows of capital have also carried new legal and governance practices with them, introducing new standards and challenging old customs everywhere.

In the United States, this dynamic has led to a collision of realities: the increased participation by international institutional investors in the U.S. capital markets has run headlong into a peculiar and thriving feature of the U.S. scene – the securities class action – which has traditionally been regarded as repugnant by many non-US investors.

While media reports in the U.S. have repeatedly reported the imminent demise of the securities class action, they remain a fact of life for all investors in U.S. markets. Indeed, the total value of all securities class action settlements that were finalized in 2006 reached an all time high of more than $18.3 billion.

And while international investors have traditionally found securities class actions to be quite literally foreign, the times they are a-changin'.

Developing international investor involvement

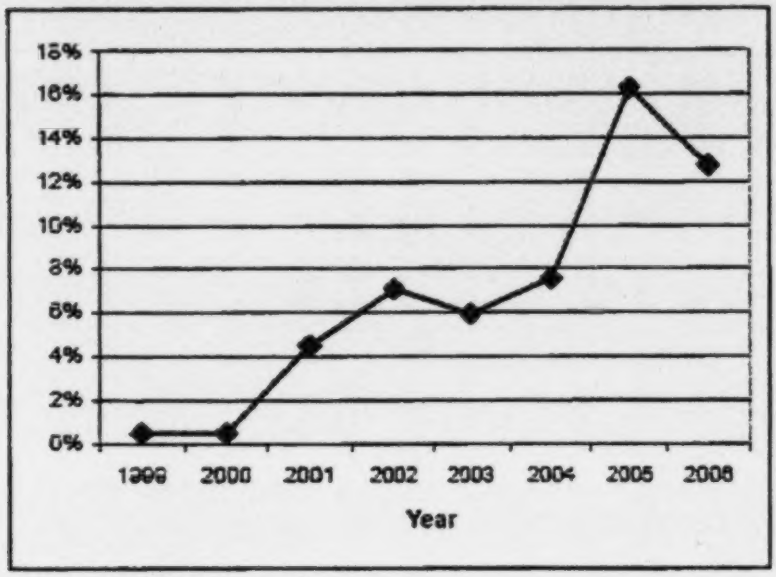
Anecdotal evidence has for some time suggested that international institutional investors were increasingly active in securities class actions in the United States. In order to to quantify the level and trends of activity, and to determine whether the anecdotes were borne out by an academic examination of participation levels, ISS undertook a study of all international institutional investors that filed lead plaintiff motions in federal securities class actions.

The lead plaintiff concept is still relatively young, stemming from the enactment in 1995 of the Private Securities Litigation Reform Act (PSLRA). Under the PSLRA, any investor or group of investors from the putative class may come forward and ask to be appointed as the lead plaintiff. The court evaluates the competing motions on the basis of which investor or group has the "largest financial interest" in the litigation. Though the statute did not specify the standard to be used for measuring this interest, the Courts most often look at the losses suffered by the different movants.

It took slightly more than three years for the first international institutional investors to file a lead plaintiff motion in a federal securities class action. In1999, in the Network Associates litigation, the investors ING, KBC Asset Management and Union Investment filed a lead plaintiff motion as part of a large group of U.S. investors. As noted by Judge Alsup in denying the applications filed by those entities, it appeared that the individuals that had committed those three institutions to the lead plaintiff filings either lacked the authority to do so, or did not fully understand the role that they were asking to assume in the litigation. *See In re Network. Assoc., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017 (N.D. Cal. 1999).

From that rather inauspicious beginning, the participation of international institutional investors in securities class actions has both substantially increased and matured, with a number of cases seeing multiple non-US lead plaintiff candidates. In every year since 2002, international institutional investors have filed lead plaintiff motions in more than 5% of all new federal securities class actions.

Figure 1. Percentage of US Class Actions with International Institutional Investor Lead Movants.



Source: ISS Research

Furthermore, these lead plaintiff candidates have not limited themselves to filing in cases involving either companies headquartered in the same home country as the investor or non-U.S. companies in general. Prominent examples included the Coca Cola, General Motors, and Dell cases. In the Dell case alone, five international institutional investors filed lead plaintiff motions and Union Asset Management, a German asset manager, was appointed lead plaintiff by the Court earlier this year.

A number of reasons may be posited for the continued upwards trend for international institutional investor involvement in securities class actions. Certainly the educational and marketing efforts of U.S. based securities litigators are a major likely source for the increased interest. Indeed, a growing group of American class action law firms sponsor, speak at, and attend international pension fund summits. Another likely factor is the increasing emphasis that US plaintiff side law firms have placed on solidifying

their relationships with international institutional investors and outside counsel for those investors. In the last 12 months two different "alliances" have been announced between U.S. and international law firms, and one U.S.-based plaintiff side firm has announced plans to open an office in the United Kingdom.

A third factor may have been the gradual realization around the world that institutional investors of all stripes are failing to file claims for their share of the settlement proceeds from securities class actions. Two substantial academic studies in this area have found that 30-70% of institutional investors fail to file claim forms in cases where they have eligible losses. Overlaying that lack of participation with the enormous sums at stake - $18.3 billion in securities class action settlements were finalized in 2006 alone – provides a powerful incentive for any institutional investor to seek a more formalized process to research, analyze, and track securities class actions. Though this is a largely passive approach to securities litigation, increased attention to the filing process may lead to more active involvement as the institution becomes more familiar and comfortable with the process.

Of course, these possible motivations are anecdotal, but have been substantiated through interviews.

Study Findings

The research conducted for this paper revealed:

- 182 different instances of an international institutional investor seeking to serve as a lead plaintiff in a US securities class action from 1996 through March 31, 2007.

- Those lead plaintiff filings occurred in 98 different cases.

- Filing investors hailed from 17 different countries. Germany, Canada, Israel, Austria, and Italy were the five most often represented countries (see Table 1).

Table 1. International Movants by Country

Country	# of Movants
Austria	13
Belgium	6
Bermuda	1
Canada	39
Denmark	3
France	6
Germany	50
Greece	1
Ireland	3
Israel	18
Italy	13
Luxembourg	4
Mexico	5
Netherlands	7
Sweden	7
Switzerland	1
UK	5

Source: ISS Research

- Twenty three different law firms represented the international institutional investors. The firms that most often represented investors – Milberg Weiss, Schiffrin Barroway Topaz & Kessler, Bernstein Litowitz Berger & Grossman, and Grant & Eisenhofer (see Table 2).

Table 2. International Movants by Firm

Firm	# of Movants
Milberg Weiss	41
Schiffrin Barroway	31
Bernstein Litowitz	18
Grant & Eisenhofer	17
Glancy Binkow	12
Murray Frank & Sailer	12
Finkelstein Thompson	10
Labaton Sucharow	8
Cohen Milstein	7
Jacob Sabo	7
Motley Rice	7
Spector Roseman	7
Lerach Coughlin	6
Pomerantz Haudek	5
Stull, Stull & Brody	5
Weiss & Yourman	4
Kaplan Fox	3
Abbey Gardy	2
Lovell Stewart	2
Shalov Stone	2
Cauley Geller	1
Federman & Sherwood	1
Graham Miller	1
Young Pickett	1

Source: ISS Research

- The investors involved in these cases are widely varied and include public pension schemes, asset managers, mutual funds, union pension plans, hedge funds, and other types of investors.

- The investors that filed the largest number of lead plaintiff motions:

- Activest Investmentgesellschaft, a German asset manager, filed 10 motions in 10 cases.
- Various DekaBank entities sought to serve 10 times, but in only 7 cases (three filed together in the Coca Cola litigation).
- Metzler Asset Management, another German asset manager, filed 8 motions in 8 different cases.
- Erste Sparinvest Kapitalanlagegesellschaft, an Austrian investment manager, filed 7 motions in 7 cases.
- Union Investment GmbH and Union Asset Management Holding AG, two related German entities, also filed a total of 7 motions in 7 cases.

Securities Class Actions Move Beyond US Borders

Recent media reports have noted that the class action concept, is increasingly taking hold across the world, as investors are given (or seize) the power that collective action grants to similarly situated groups in litigation. This year alone, we have seen the first reported securities class action filed in Africa, in a case involving the Nigerian subsidiary of Cadbury Schweppes Plc along with a first of its kind proposed settlement in the Netherlands of claims on behalf of non-US investors in Royal Dutch Shell.

We expect this trend to continue, as more countries either allow securities class actions, or international investors "test the waters" in their home countries when they believe the forum or remedy is more appropriate for the particular situation they face.

Conclusions

The high level of activity we are seeing from the German speaking portions of Europe appears to be due in part to relationships between US and European law firms and with a number of active European institutional investors. Arguably,

the lack of a class action mechanism and the often glacial place of individual securities litigation cases in Germany are factors driving this trend.

Additionally, the activity we are seeing from Israel will also likely continue, both because the legal environment there allows for securities class actions and one or more US based firms have relationships with both law firms and institutional investors in Israel.

While there has been an upsurge in activity from UK investors, the overall numbers are still quite low compared with many other European countries. Perhaps it is time for the "mother country" to catch up with her former colonies, as the US, Canada, and Australia all allow investors to file securities class actions to recoup losses.

In any event, it truly is an interesting time to be following securities class actions.

This paper was written by **Adam Savett**, VP, Product & Market Segment Manager, of Securities Class Action Services at Institutional Shareholder Services, and author of the Securities Litigation Watch blog at http://slw.issproxy.com.

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